Carruthers Ready Mix, Inc. *and* General Drivers, Salesmen and Warehousemen's Local No. 984, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 26–CA–8336

July 9, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 24, 1981, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified below.

1. On October 22, 1979,[2] Respondent's Tennessee-based employees began a strike which lasted until November 13. On the first day of the strike, Respondent's president, Bobby Carruthers, asked each striker if he intended to work that day, and told the strikers that he did not "want no Union there and wasn't going to have no Union there." He then told striker James Wilborn in the presence of other strikers that, if Wilborn "wanted a Union, why didn't [Wilborn] go and work for somebody with a Union because he wasn't going to have no Union there." The Administrative Law Judge found that Carruthers' statement to Wilborn did not violate Section 8(a)(1) of the Act because it was not a threat of reprisal but, rather, merely an expression of Carruthers' union hostility, it was isolated, and it had no discernible coercive impact on the employees. We disagree.

We have consistently found that an employer's statement similar to that made by Carruthers to Wilborn could reasonably be interpreted that union supporters would not be tolerated at the employer's plant and thereby interfered with and coerced an employee in the exercise of his or her Section 7 right to join a union.[3] Here, the surrounding circumstances particularly support such an interpretation. The remark was made by Respondent's president, on the first day of the strike, and in the presence of other striking employees. Furthermore, that other striking employees were present shows that the remark was not isolated but, rather, that its coercive effect could be far reaching. Accordingly, we find that Carruthers' remark to Wilborn violates Section 8(a)(1).

2. The General Counsel has excepted to the Administrative Law Judge's failure to find that Plant Manager Hunter Carruthers' remark to striker Eddie Cowan on November 7 was coercive and violative of Section 8(a)(1) of the Act. Cowan testified that on November 6 he told Carruthers that he was ready to return to work, and that Carruthers responded that he had no work and "if it was up to him he would not put any of the strikers back to work." Carruthers denied making this statement. The Administrative Law Judge found it unnecessary to resolve the conflicting testimony because the remark was not alleged as a violation, notwithstanding that the issue was fully litigated, and, therefore, he did not make a finding of the merits. However, he did note that the statement was similar to statements Carruthers made to other employees, including William Frazier, who was unlawfully discharged by Carruthers because of his participation in the strike. Further, in other parts of his Decision, the Administrative Law Judge found that Carruthers was evasive; that his testimony was self-serving, exaggerated, and untruthful; and that, as a witness, he "was more interested in supporting a litigation theory than in testifying candidly about events herein." In these circumstances, we credit Cowan's testimony on this point. Cf. *Apollo Tire Company, Inc.*, 236 NLRB 1627 (1978). Accordingly, we find Hunter Carruthers' statement violative of Section 8(a)(1) of the Act.

3. We disagree with the Administrative Law Judge's finding that, at the conclusion of the strike, striker Aubrey Fletcher obtained a regular and substantially equivalent job with another company and, therefore, he is not entitled to backpay. On or about November 9, mixer-driver Fletcher made an unconditional offer to return to work, but no positions were then open. On November 13, when the strike ended, he began working for another ready-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge that Respondent violated Sec. 8(a)(3) of the Act by terminating Milton Brown because of his participation in the strike. We find Respondent's contention that it terminated Brown because of his prestrike conduct to be a pretext, and that only one genuine reason exists—Brown's participation in the strike.

[2] All dates are in 1979 unless otherwise indicated.

[3] *Ramar Dress Corp; Samuel Todaro, Individually*, 175 NLRB 320, 327 (1969); *Motel 6, Inc.*, 207 NLRB 473, 477 (1973).

mix concrete company as a mixer-driver. In December and in early January 1980, Respondent made several attempts to recall Fletcher by telephone, but sometimes the calls went unanswered. When the telephone was answered, Respondent left messages for Fletcher to call Respondent. On January 13, 1980, Respondent again telephoned Fletcher and was told by the person who answered that Fletcher was working for another company. In April 1980, Respondent succeeded in contacting Fletcher and asked him if he wanted to return to work. Fletcher refused, stating that he already "had a job."

Although an employer is under no obligation to offer work to an economic striker who has obtained "regular and substantially equivalent employment" prior to the time a position with the employer becomes available,[4] the employer has the burden of proving that the striker's new job was in fact substantially equivalent to the job the striker held with the employer.[5] Here, the Administrative Law Judge presumed that Fletcher's new job was substantially equivalent because he had a job in November, before any positions were open, and then turned down an opportunity to return to work the following April because of that job.

Based on the record before us, we are unable to determine whether, from November, when he began working at his new job, until April, when he expressly refused to return to work for Respondent, Fletcher's new job was substantially equivalent to the job he had had with Respondent. Nor will we engage in such conjecture. Respondent had the burden to prove that the new job was substantially equivalent, but it failed to present any evidence on this issue.[6] Therefore, we find that Fletcher is entitled to backpay from the first day Respondent had a position open for him after his unconditional offer to return to work until the day in April 1980 when he expressly refused to return to work.

4. The Administrative Law Judge found, *inter alia*, that Respondent made reasonable and adequate efforts to contact striker Sidney Moore; that Moore did not respond to Respondent's communications because he already had a job; that by reemploying Moore for 2 or 3 days Respondent satisfied its recall obligations; and that, therefore, Moore is not entitled to reinstatement. We disagree.

Prior to the strike, Moore worked at one of Respondent's Tennessee plants. After the strike, Respondent's efforts to recall Moore consisted of unanswered telephone calls to Moore; a January 9, 1980, letter, which Moore credibly denied receiving, stating that Respondent had "a position" open for him; and a February 7, 1980, telephone call which was answered by an unidentified person who told Respondent that Moore was working at another job. Moore testified without contradiction that he had no knowledge that Respondent had ever attempted to get in touch with him regarding reinstatement until May 1980. Immediately after Moore heard indirectly that Respondent had inquired whether he would report to work, he talked with Respondent and then reported for work on May 7, 1980. On his third day of work, Moore was "laid off" from Respondent's Strayhorn, Mississippi, gravel pit[7] because of faulty equipment.[8] Moore had no further contact with Respondent.

On these facts we find, contrary to the Administrative Law Judge, that Respondent did not satisfy its requirement to communicate its offer of reinstatement to Moore; that Moore was not reinstated to a substantially equivalent job; and that, therefore, Moore is entitled to reinstatement and backpay.

As the Administrative Law Judge found, an employer's offer of reinstatement must be reasonably calculated to communicate the offer.[9] Telephone calls to an employee's residence where there is either no answer or where a message is left with a third party, but not communicated to the striking employee, are insufficient,[10] as are offers transmitted by ordinary mail which the striking employee credibly denies receiving.[11] This is so because the employers, being the wrongdoers, must bear the consequences of potentially defective means of communication where more reliable means are available.

Here, Moore credibly testified that he did not receive Respondent's January 9, 1980, letter. Further, the record does not support the Administrative Law Judge's finding that Moore received, but chose not to respond to, Respondent's February phone call. Moore also credibly denied any knowledge of efforts by Respondent attempting to communicate with him prior to May 1980. Finally, when Moore did become aware that Respondent

[4] *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

[5] *Routh Packing Company, Inc.*, 247 NLRB 274, 278 (1980); *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967).

[6] See *Little Rock Airmotive, Inc.*, 182 NLRB 666 (1970).

[7] The Administrative Law Judge found that Moore worked at the Senatobia gravel pit. The record reflects that the Senatobia and Strayhorn gravel pits are the same.

[8] While the record is not clear whether Moore's entire period of reinstatement was spent working at Strayhorn, there is no question but that Moore was working at the Strayhorn gravel pit at the time he was laid off and was to return to that location once the equipment was repaired.

[9] *Monroe Feed Store*, 122 NLRB 1479, 1480–81 (1959).

[10] *Carter of California, Inc., d/b/a Carter's Rental*, 250 NLRB 344, 350 (1980).

[11] *J. H. Rutter-Rex Manufacturing Company, Inc.*, 158 NLRB 1414, 1524 (1966); see also *Standard Materials, Inc.*, 237 NLRB 1136, 1146–47 (1978).

was considering recalling him, he immediately contacted Respondent and thereafter commenced work within 2 days. On these facts, we find that Moore never received the message left for him by Respondent. We therefore find that until May 1980 the means used by Respondent were not reasonably calculated to communicate the offer and thereby did not satisfy its obligation.

We further find that Respondent did not meet its reinstatement obligation by employing Moore for 2 or 3 days in May. As noted above, the record is not clear whether Moore spent his entire period of reemployment at Strayhorn. Respondent admits, however, that at the time Moore was laid off because of faulty equipment he was assigned to work at Strayhorn. Respondent also acknowledges that it was the Strayhorn site to which Moore was supposed to return once the equipment was repaired. Since there is no evidence that the pay and benefits of Strayhorn jobs were the same as those received by the strikers at their former jobs in Tennessee, the Administrative Law Judge found, and we agree, that Respondent's offers of employment to Strayhorn jobs did not constitute offers to substantially equivalent employment.[12] For the same reason we cannot find that Respondent's 2- or 3-day employment of Moore, part of which was spent at Strayhorn, constitutes substantially equivalent employment, particularly since Moore was laid off from and expected to return to that location. Accordingly, we find that Moore is entitled to reinstatement and backpay.[13]

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusions of Law 3 and 4 and renumber the remaining Conclusions of Law accordingly:

"3. By suggesting to striking employees that union supporters would not be tolerated at Respondent's plant, Respondent interfered with its employees' right to join a union in violation of Section 8(a)(1) of the Act.

"4. By threatening an employee that he would not be recalled because of his participation in the strike, Respondent interfered with the employee's right to engage in a lawful strike in violation of Section 8(a)(1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Carruthers Ready Mix, Inc., Collierville and Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraphs 1(c) and (d) and reletter the remaining paragraphs accordingly:

"(c) Suggesting to employees that union supporters will not be tolerated at its plant.

"(d) Threatening employees that they will not be recalled because of their participation in a lawful strike."

2. Substitute the following for paragraphs 2(b) and (c):

"(b) Reinstate the employees named below to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges:

Mario Burks	B. J. Mosely
Nathaniel Jones	Percy Porter
Robert E. Jones	Eugene Sanders
McQuirin Malone	Oscar Wells
Steve McClain	Jimmy Wilborn
Sidney Moore	Eddie Williams

"(c) Make the above employees and the following employees whole for any loss of earnings they may have suffered because of the failure of Respondent to properly reinstate them on and after December 13, 1979, in the manner set forth in the section of this Decision entitled 'The Remedy':

Earl Banks	Edward Moore
Grafton Burton	James Moton
Aubrey Fletcher	James Price
Columbus Jones	James Walker
Bobby Jones"	

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

[12] See *Routh Packing Company, Inc., supra.*

[13] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on any backpay due herein based on the formula set forth therein.

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge, terminate, or otherwise discriminate against our employees in regard to their hire or tenure of employment or any term or condition of employment because they engage in a strike or any other protected concerted or union activity.

WE WILL NOT refuse to accord strikers who were not permanently replaced as of November 13, 1979, reinstatement rights to which they are entitled as economic strikers.

WE WILL NOT suggest to any of our employees that union supporters will not be tolerated at our plants.

WE WILL NOT threaten our employees that they will not be recalled if they participate in a lawful strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer employees Milton Brown and William Frazier immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, plus interest.

WE WILL reinstate the employees named below to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges:

Mario Burks	B. J. Mosely
Nathaniel Jones	Percy Porter
Robert E. Jones	Eugene Sanders
McQuirin Malone	Oscar Wells
Steve McClain	Jimmy Wilborn
Sidney Moore	Eddie Williams

If positions are not available to the above employees because vacancies did not occur after December 31, 1979, in jobs for which they are qualified, they will be placed on a preferential hiring list based on nondiscriminatory standards unless they have obtained regular and substantially equivalent employment prior to the time when jobs to which they are entitled become available.

WE WILL make the above employees and the following employees whole for any loss of earnings they may have suffered because of our failure to properly reinstate them on and after December 13, 1979, plus interest:

Earl Banks	Edward Moore
Grafton Burton	James Moton
Aubrey Fletcher	James Price
Columbus Jones	James Walker
Bobby Jones	

CARRUTHERS READY MIX, INC.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard in Memphis, Tennessee, for 6 days in September and October 1980. The complaint, as amended, alleges that Respondent violated Section 8(a)(3) and (1) of the Act by failing properly to recall and reinstate economic strikers who offered unconditionally to return to work after the end of their strike and by discharging two of the strikers, and that Respondent violated Section 8(a)(1) of the Act by threatening employees on one occasion at the beginning of the strike. Respondent denies the essential allegations of the complaint. The parties filed briefs.

Upon the entire record and considering the testimony of the witnesses and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a corporation with offices and places of business in Collierville and Memphis, Tennessee, is engaged in the sale and distribution of ready-mix concrete. Annually, Respondent purchases and receives, at its facilities in Collierville and Memphis, Tennessee, products, goods, and materials valued in excess of $50,000 directly from points outside the State of Tennessee. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Charging Party (hereafter the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Evidence*

Respondent operates a large ready-mix company in and around Memphis, Tennessee. Respondent operates

from several different locations. All the drivers report to and are based at two locations, the Winchester facility which services commercial construction projects or the Collierville facility which supplies residential builders. Respondent has two other batching locations with only a small complement of employees. Respondent also operates a gravel pit operation near Senatobia, Mississippi, also known as the Strayhorn facility. The employees involved in this case were mixer-drivers based either at Winchester or Collierville and gravel truckdrivers who were not based at any particular location.

The officers and supervisors of Respondent are as follows: Bobby Carruthers, president; Joe Carruthers, Bobby's brother, vice president; Sally Carruthers, Bobby's wife, secretary-treasurer and personnel manager. Hunter Carruthers, another brother of Bobby's, was the plant manager at the Winchester location from July 1978 until February 1980. Mose Harrison, a foreman at Collierville, was stipulated to be a supervisor within the meaning of the Act after January 1, 1980. Two other employees, lead drivers John Nichols and Essie White, were sometimes used by Respondent to contact employees and had some authority to direct employees. They, however, were not supervisors within the meaning of the Act.

In mid or late September 1979, Winchester mixer-driver William Frazier asked Hunter Carruthers to invite Bobby Carruthers to a meeting of employees. A meeting of all drivers was held at the Winchester plant. The employees voiced their interest in higher wages to Bobby Carruthers. Frazier spoke for the drivers. Carruthers said he could not afford to pay the drivers more money.[1]

Thereafter, the employees availed themselves of the aid of the Union and signed a sufficient number of authorization cards to support a petition for an election. The petition was apparently filed by the Union with the Regional Office of the Board on October 22, 1979. The same day, a number of the drivers engaged in a strike against Respondent which lasted until November 13, 1979.

On the day the strike began, Bobby Carruthers appeared at the Winchester plant. He approached Frazier and asked him if he was causing the refusal to work. Frazier denied that he was responsible. Carruthers also asked Frazier why the employees were striking. Frazier responded, "We want a Union to protect our job and our rights." Carruthers said, "We don't need a Union. We can work without a Union. . . . We get along fine, and we can continue to get along fine without a Union."[2]

Employee James Wilborn, a Winchester driver, testified that on October 22, the day the strike began, Bobby Carruthers approached the strikers and said he "didn't want no Union there and wasn't going to have no Union there. He told me personally that if I wanted a Union, why didn't I go and work for somebody with a Union because he wasn't going to have no Union there." After these remarks by Carruthers, Wilborn joined the strike. Carruthers denied that he made these remarks although he admitted talking to strikers on the first day of the strike and admitted that Wilborn was one of the employees who was present. Wilborn was an honest witness. Moreover, his testimony about Bobby Carruthers' antiunion views and remarks is similar to that detailed by other credible witnesses including Frazier. It also conforms with my assessment of the demeanor of Bobby Carruthers as a hotheaded person. For example, when he testified about the meeting at which Frazier asked for a wage increase, he volunteered that employees thereafter started passing out union cards and remarked, "I can tell you who the people were that passed them out." Thus, I do not accept Carruthers' denial that he made the antiunion remarks to Wilborn. However, I do not consider Bobby Carruthers' outburst to have been violative of Section 8(a)(1) of the Act as alleged by the General Counsel. He made no threat of reprisal and simply vented his antiunion hostility. The statement was isolated and had no discernible coercive impact. I shall therefore dismiss this allegation of a violation.

On the Friday of the week following the beginning of the strike, Frazier came to the Winchester facility to pick up his check, and spoke with Hunter Carruthers. Hunter asked him why the employees were striking and Frazier responded that they wanted more money. Hunter pointed out that Bobby Carruthers had said that he could not pay more money. Frazier then said, "[I]f we can't get any more money, I just can't work." Hunter replied, "Well, you are no longer needed here. You are fired." Frazier then left and rejoined the picket line.[3]

During the strike, the employees set up a picket line at the Winchester and the Collierville locations. At least some of the signs stated that Respondent refused to bargain with the Union. There apparently were also pickets at construction sites where Respondent delivered concrete. Respondent filed a charge with the Board against the Union in Case 26-CB-1577 alleging violence on the picket line. Respondent also sought injunctions in state

[1] The above is based on the credible testimony of Frazier. Carruthers did not seriously controvert Frazier's testimony on this point, although he placed the meeting in late August or early September. Carruthers did testify that, after the meeting, the employees started distributing union authorization cards.

[2] The above is based on the credited testimony of Frazier, a candid and honest witness whose testimony withstood cross-examination. Bobby Carruthers denied that he had such a conversation with Frazier although he did concede that he spoke with some employees the first day of the strike. Bobby Carruthers did not impress me as a reliable witness. He was not responsive in some of his answers and his testimony about why he did not fire or recall Milton Brown was implausible, contradictory, and incredible.

[3] Hunter Carruthers denied that he made this statement to Frazier, but I credit Frazier who was a more reliable witness than Hunter Carruthers. Hunter seemed evasive to me in some of his answers and he exaggerated about an incident which led to his alleged suspension of Frazier about a month before the strike. He testified that Frazier had missed about 2 weeks without calling in and that he suspended Frazier for a couple of weeks. No documentary evidence was submitted of the suspension and Sally Carruthers testified that Frazier apparently only missed 1 day—a Saturday—before being suspended for 2 weeks. Despite Hunter's apparent effort to besmirch Frazier's record, even to the point of making an unsupported reference to his being drunk, he called Frazier one of his "best" drivers when he was trying to show that Frazier would have been put to work after the strike if he had contacted Respondent. My assessment of Hunter Carruthers as a witness was that he was more interested in supporting a litigation theory than in testifying candidly about the events herein.

and local courts. The Union had apparently also filed a charge against Respondent. On November 2, the Union, through its business agent, Arthur Crutcher, sent a telegram to Respondent stating that the strikers would return to work on Monday, November 5, 1979, if Respondent would withdraw the CB charge and agree to an election which was the subject of a petition by the Union in Case 26-RC-6119. Respondent did not reply to the telegram.

After sending the telegram, Crutcher conducted a meeting of the strikers and told them they should report to work on Monday as stated in the telegram. Pursuant to Crutcher's instructions, a number of strikers appeared at the Winchester and Collierville facilities on November 5 and 6 and asked to be returned to work. At Winchester, most talked to Hunter Carruthers who insisted on seeing them individually. He told them that they had been replaced, that there were no positions available, and that they should either keep in touch or that they would be called when positions became available. In Collierville, the employees met with Bobby Carruthers at the Carruthers Insurance Company offices where Bobby Carruthers had his office. Some of the strikers who spoke with Hunter Carruthers resumed their picketing after they were not put back to work.

During the strike, an unspecified number of employees abandoned the strike and returned to work. Some contacted Respondent and were asked to return as positions became available. Respondent had hired some 34 replacements during the strike.

On November 12, 1979, Respondent requested a meeting with the Union to discuss an end to the picketing. Respondent was represented by its attorney, Reid Meyers, and the Union was represented by its attorney, Howard Paul. The parties discussed the CB charge which had apparently blocked the election petition, the removal of the pickets, and the injunctions against the Union in the state and local courts. The Union offered to end the strike and the picketing but sought to have the strikers recalled in order of their seniority. Respondent refused to apply seniority in the recall of strikers. In the course of the meeting, Bobby Carruthers stated that he realized that he had to have good drivers on the trucks and "experience means a lot."

The next day, November 13, the parties met again at the Regional Office of the Labor Board and reached a strike settlement agreement. According to the reliable and credible testimony of union counsel Paul, the Union made an offer that all pending charges would be withdrawn, the two lawsuits would be dismissed without prejudice, and an election would be held on December 7; that the picketing would cease; and that the employees, who were said to be available for work, would be recalled in order of seniority. Respondent agreed to the Union's proposal except that Respondent refused to accept the recall on the basis of seniority because it had never utilized seniority in the past. The agreement included the recall of all the strikers except for an employee named Green who had allegedly engaged in picket line violence. Respondent also retained the right to investigate the misconduct of another employee whose name could not be recalled by Paul. The parties also agreed that they would divide the costs of the lawsuits equally. Sally Carruthers did not seriously dispute Paul's testimony. According to Mrs. Carruthers, Respondent wanted the strikers back "as positions became available" and, although she did not remember "specifically agreeing to that," she testified, "I'm sure that if we were asked [by the Union], we said, 'Yes, we would take them back as soon as we had positions available.'"

On November 13, 1979, the parties signed a Stipulation for Certification Upon Consent Election which was approved by the Regional Director for Region 26. Union attorney Paul drafted orders dismissing the local and state lawsuits, although, by inadvertence, one of the orders was not entered until sometime in March or April 1980.

After the November 13 strike settlement agreement, most strikers individually requested reinstatement. Some were returned to work as positions became available and others were told to keep in touch with Respondent or that they would be called when needed.

The Board election was held on December 7, 1979, in the following appropriate unit:

> All production and maintenance employees, including all truckdrivers, yardmen, batch operators, mechanics, helpers and servicemen employed at Respondent's Collierville and Memphis, Tennessee locations, excluding all office clerical employees, guards and supervisors as defined in the Act.

The Union lost the election and a certification to that effect issued on December 17, 1979. Prior to the election, on November 15, 1979, Respondent had mailed letters to the employees by ordinary mail urging them to reject the Union. Letters were sent to the last known addresses of the employees as they appeared on Respondent's records. The letters were also sent to the striking employees who had not yet been returned to work.

Among the employees who spoke to officials of Respondent after the strike was Frazier. He called Hunter Carruthers on the telephone about 2 weeks after the strike was over and asked for his job back. Hunter said, "You are no longer needed for the company because you are a troublemaker." Frazier thanked him and hung up. He made no further effort to contact Respondent.[4]

Milton Brown was a mixer-driver who worked out of the Winchester location. Brown did not join the strike until a few days after it began. At one point, Brown spoke to Bobby Carruthers and told him that he could not continue to work because of his fear of violence on the picket line. Carruthers assured him that nothing would happen to him if he continued working. When Brown pressed for a guarantee, Carruthers drafted a statement promising Brown that he would take care of Brown and his family if he would continue to work. The statement reads, "I will take care of Milton Brown's family if something should happen to him during the Union situation if he should get injured or damaged in

[4] In late October or early November after Hunter Carruthers had first told him he was fired, Frazier began working for Allen Ready Mix, another concrete company in Memphis.

any way." Brown continued to work but, after a few days, Brown joined the strike.

About 2 days after the strike ended, Brown spoke to Hunter Carruthers and offered to return to work. Carruthers replied, "You refused to work when I needed you. You walked off your job, so I don't have a job for you now." Brown asked if that meant he was fired. Carruthers said it did not, but that he did not have work for him at that time. He said he would call Brown if a position became available. This is based on the credited testimony of Brown whom I found to be a candid and truthful witness totally without guile, unlike Hunter Carruthers whom I did not find to be a forthright witness. Thereafter, Brown continually showed up at Respondent's premises and asked either Sally or Bobby Carruthers whether he could return to work. He was never returned to work. At one point he spoke to Bobby Carruthers who told Brown to stop "pestering" him and stated that Brown "had a job, and you walked off it. I just don't have anything for you."

Bobby Carruthers testified that, after the strike, he "didn't want to hire Milton back." He said that he did not recall Brown because of his prestrike work history which included some accidents and because "we had better drivers." When asked if he would take Brown back if he were the only striking employee not recalled and a vacancy were available, Carruthers said he would not "because of the things he did before."

I did not view Bobby Carruthers as a truthful or reliable witness. His testimony about Milton Brown illustrates his unreliability. At first Carruthers testified that he did not want to rehire Brown after the strike. Later, when questioned about his statement promising protection of Brown during the strike, he testified that although he did want Brown to return he changed his mind in February 1980 at which point he decided against recalling Brown. Yet he did not tell Brown of his decision even though Brown repeatedly sought reinstatement personally from Carruthers. Bobby Carruthers' attempt to tarnish Brown's record as a driver is refuted by his own attempt to keep Brown on the job during the strike. Although Mrs. Carruthers was a more credible witness than her husband, she also testified that Respondent did not intend to recall Brown because of his prior employment history which included two accidents and his driving history. She could not recall when the accidents occurred or how long before the strike the second accident occurred. She testified that Respondent decided sometime after Christmas that Brown would not be recalled. She also testified that, as far as she was concerned, Brown's employment was terminated as of that date but she did not immediately tell Brown that he would not be recalled. In fact, Mrs. Carruthers never specifically told Brown he was terminated but simply told him that he should look for another job. Despite Respondent's attempts at the hearing to paint Brown as a poor driver, it sent him a letter in June 1980 offering him a job at its Senatobia gravel pit. Although it is clear that Respondent was attempting to limit its potential backpay liability by sending this letter, Mrs. Carruthers' testimony in explaining why Brown was qualified for this job after having continually been rejected for employment reflects adversely on the candor which otherwise characterized her testimony. Hunter Carruthers testified that Brown was a poor driver who had many accidents but he could not remember how many. He also testified that he fired Brown at some unspecified point in the summer of 1979 but was overruled by Bobby Carruthers. Actually, it appears, from Brown's candid testimony, that Brown was fired but that the decision was changed on appeal to Bobby Carruthers to a 3-day suspension for an incident which took place 6 or 7 months before the strike. Brown was blamed for causing damage as a result of an accident on Respondent's premises. Brown denied he was responsible and made an appeal on that basis to Bobby Carruthers. Bobby Carruthers reinstated Brown after a 3-day suspension. Brown, of course, worked up until the period of the strike. My assessment of Hunter Carruthers' testimony and of his demeanor on the witness stand was that he was straining to support Respondent's litigation theory rather than attempting to tell the truth. In short, when testifying about Milton Brown, Bobby, Sally, and Hunter Carruthers were not truthful or reliable and I do not credit their testimony.

Mrs. Carruthers testified that returning strikers started reporting back to work on November 5, 1979, and that they were put on trucks as they reported. Later in November she began making telephone calls to the strikers trying to fill open positions. Several of the replacements indicated that they would be leaving in early December thereby creating still more openings.

Beginning on December 11, 1979, Mrs. Carruthers made a list of strikers and divided it basically into three categories: Winchester mixer-drivers, Collierville mixer-drivers, and gravel truckdrivers. At this point, Respondent needed to fill one vacancy for a gravel truckdriver. Mrs. Carruthers called several employees from her list of gravel truckdrivers on December 11, 1979. The names were listed in alphabetical order and she testified that she called employees in that order. She was unable to reach any of the employees on the list so she called a former employee who had been laid off before the strike, Roger Ford. He reported for work on Thursday, December 13, 1979. He filled a position previously occupied by a replacement who had told Mrs. Carruthers that he was quitting either the prior Monday or Friday.

Two mixer-drivers were hired for the Winchester location on December 20, 1979. On December 18 and 19, Mrs. Carruthers called strikers on the Winchester mixer-driver list. She was unable to reach any of the employees. She wrote a letter to employee William Echols because there was no answer when she called his telephone number. She also sent a letter to striker W. G. Williams when she was told that his number was disconnected. The two drivers hired on December 20, Marshall Chisholm and Edward Hunter, were hired on a probationary basis because they had never driven mixers before. Mrs. Carruthers testified that many of the new hires were untrained and had to ride with other drivers for a period of from 2 days to 2 weeks until they demonstrated that they could drive the trucks and perform their work capably.

In late December and early January, other jobs became available. As Mrs. Carruthers testified, she was

"[n]ot in such a big hurry to get them at this point because we were into January—the middle of winter, and the trucks could sit for a while."

Beginning on January 9, 1980, Mrs. Carruthers began again to consult her gravel truck list and made calls to strikers on that list. She was unable to reach anyone on the list and, on January 15, she hired one Willie Malone. It is unclear whether he was a former striker or not.

At this point, Respondent needed to fill four or five positions for Winchester mixer-drivers. On Sunday, January 13, she began calling from her list. She struck some employees from her list because she was told a person had moved or was otherwise unavailable or because the person had not returned an earlier call. She made other calls on January 15. She reached some of the people on her list and they returned shortly thereafter.

On January 18, 1980, Mrs. Carruthers hired Lewis Byrd and Constance Collins for Winchester mixer-driver slots. On January 21, she hired George Harper and Ronald Jones and, on January 25, she hired M. B. Smith, all for Winchester mixer-driver slots. All were hired on a probationary basis. On January 23 and 24, she hired two gravel truckdrivers. Three of these people did not survive their probationary period.

There became a need for more gravel drivers in February so, on February 5, Mrs. Carruthers consulted her list of gravel truckdrivers. She did not call Harvey Burke because she had sent him a letter on January 9. She was unable to speak to any of the others whom she called, although she left messages to return the call when someone answered the phone. She hired two women for gravel truckdriver positions on February 7. They were dismissed within a week. On January 13 and 14, she hired two more mixer-drivers for Winchester from "off the street." Neither of them worked out. She did not call anyone else at this point but told her lead drivers and supervisors to try to get in touch with the drivers. Some more of the returning strikers were hired as they were contacted by these intermediaries or as they themselves contacted Respondent.

On February 25, 1980, Mrs. Carruthers hired a gravel truckdriver, V. A. Feathers, who worked for about 3 weeks then transferred to the Strayhorn location. She did not try to get in touch with any strikers before hiring Feathers. She had last tried to reach them on February 5.

On March 17, 1980, Respondent hired a nonstriker for a Collierville mixer-driver position. She did not make any calls to strikers before hiring him, but she had exhausted her Collierville list in January and was satisfied that the employees were unavailable or could not be reached. The employee hired on March 17 is still working for Respondent.

On March 22, Respondent hired a new employee as a Winchester mixer-driver. He worked beyond his probationary period. And, on March 26, Respondent hired another gravel truckdriver. He is still working for Respondent. Mrs. Carruthers did not make efforts to contact the strikers before hiring these employees. However, during March and April other strikers returned to work either as a result of Respondent's contacts or their own. In May 1980, Respondent hired Roy Brownley for a Collierville mixer-driver position. He was an experienced mixer-driver who had worked for Respondent in the past. Mrs. Carruthers made no additional specific effort to contact strikers before hiring Brownley.

Mrs. Carruthers testified that she employed new hires for the following positions: Three gravel truckdrivers, one Collierville mixer-driver, and five Winchester mixer-drivers. This was apparently a reduction in the number of truckdriver positions from the beginning of the strike due to the leasing of trucks in April and again in August 1980. Thus, even though many new employees were hired in the period after the strike, most did not last very long and there were only eight positions which were filled by new hires after the strike and after Respondent became fully operational.

On March 20, 1980, the Union filed a charge in the instant case alleging discrimination against strikers because of Respondent's refusal to recall them after the strike. The original complaint herein issued on May 12, 1980.

In late May and early June, Mrs. Carruthers contacted striking employees who had not been recalled and offered them a job driving a gravel truck at Respondent's Strayhorn location. Respondent had two openings at Strayhorn at this time. Mrs. Carruthers called some employees and sent the letters, by registered and certified mail, either confirming the telephone calls or stating the job offer. Most of the letters were dated June 2, 1980, and they were sent after Mrs. Carruthers spoke to Labor Board officials about her responsibilities in recalling strikers. The letters were sent with return receipt requested. None of the employees who were contacted accepted the job offer. Most of them expressed a reluctance to travel the required distance to the jobsite in Senatobia or Strayhorn, Mississippi. The Strayhorn location was about 40 miles from the Memphis homes of the employees who were contacted and they had no transportation to the jobsite. Respondent did not offer them transportation to Mississippi.

The trucks operated by Respondent at Strayhorn were not on-the-road trucks. They were trucks with cranes which were driven solely on the gravel pit property. Before the strike, about eight employees reported to Respondent's Strayhorn facility. None of them went on strike. After the end of the strike, the facility was closed for the winter. It was reopened in or about April 1980. The Strayhorn employees were recalled at intervals and, by the time of the hearing, Respondent employed 11 people at the Strayhorn location, 3 more than at the beginning of the strike.

B. *Discussion and Analysis*

1. The discriminatory termination of strikers Milton Brown and William Frazier

I find that, at some unspecified point after the end of the strike, Respondent terminated Milton Brown and did so because he joined the strike after Bobby Carruthers had made a personal effort to have him continue working. Because I do not accept the self-serving testimony of Respondent's witnesses that the decision to terminate Brown's employment was made in December, January,

or February, and because I believe Respondent did not intend ever to recall Brown after the strike, I shall fix his date of termination on the day the strike ended, November 13, 1979. It was 2 days thereafter that Hunter Carruthers rejected his bid for reemployment by referring to his having engaged in the strike. Respondent's treatment of Brown during the period after the strike shows that he was discriminatorily terminated from his employment. In addition to Hunter Carruthers' statement to Brown, Respondent's antiunion hositility is demonstrated by similar statements made by Hunter and Bobby Carruthers to other employees. Accordingly, the General Counsel has made a *prima facie* showing that Brown was terminated for engaging in protected and union activities.

Respondent's reliance upon Brown's alleged prestrike misconduct as a reason for terminating him not only fails to withstand scrutiny but also buttresses my finding that he was discriminated against for striking. Prior to his involvement in the strike, Brown's alleged work deficiencies were tolerated. After he was suspended for 3 days in the spring of 1979, he continued to work 6 or 7 months until the strike. The record does not show any further disciplinary warnings or incidents. Bobby Carruthers went to great lengths to make financial guarantees to Brown if he would drive a truck for him during the strike. Hunter Carruthers never mentioned his alleged poor performance when, 2 days after the strike ended, he rejected Brown's offer to return to work. He referred only to the fact that Brown had engaged in the strike. Yet, despite having employed Brown up until the time when he struck without concern over his two accidents or other alleged deficiencies, Respondent, after the strike ended, refused to recall Brown and did not even have the decency to tell him he would not be employed until some time after the decision was allegedly made. This contrasts markedly with the assertion of Bobby Carruthers that he "liked" Brown. But for Brown's participation in the strike, Brown would not have been terminated and the termination of Brown was thus violative of Section 8(a)(3) and (1) of the Act.[5]

Respondent's termination of Frazier was also discriminatorily motivated and thus violative of Section 8(a)(3) and (1) of the Act. Frazier was the leader in the employees' efforts to obtain higher wages. Bobby Carruthers questioned whether Frazier was responsible for the strike. The next week, after questioning Frazier concerning the reasons for the strike, Hunter Carruthers told Frazier he was fired. Frazier called Hunter one more time offering to return to work, at which time Hunter told him he was a "troublemaker and that he was no longer needed." Frazier was an honest witness who testified candidly and in meaningful detail. I do not credit Bobby and Hunter Carruthers. I found them to be unreliable witnesses as exemplified in their self-serving and untruthful testimony about Milton Brown. Respondent asserts that it was not shown that Hunter made similar statements to other strikers. Actually, Respondent's treatment of Milton Brown is quite similar and Brown's testimony concerning Hunter's remarks to him in effect corroborates Frazier that similar remarks were made to him. But, more importantly, Frazier was the known leader in the effort to press employee grievances and was thought to be responsible for the strike. In these circumstances it is clear that Frazier was discharged in early November 1979 because of his union and protected concerted activity in violation of the Act.

Respondent does not allege a business reason for Frazier's discharge—indeed Hunter Carruthers testified that he was one of his best drivers—but argues instead that Frazier was not terminated. The credited testimony belies this assertion. Hunter Carruthers testified that Frazier would have been recalled under normal circumstances. Yet he was not recalled by Respondent, thus supporting the inference that he was terminated. That Frazier failed to affirmatively contact Respondent for his old job simply reinforces the inference that Frazier believed he was discharged. There is some ambiguity in Respondent's failing to challenge Frazier's vote in the election. However, I do not believe that this aids Respondent's position. Certainly, Frazier was entitled to vote even as an unlawfully discharged employee. And Respondent could hardly have been expected to challenge Frazier on the ground that he was discriminatorily discharged. Nor is it availing to Respondent's position that, at some point, Mrs. Carruthers learned that Frazier was working elsewhere. She testified that she learned this on December 19, 1979, when she called his number and was told he was working for another firm. Yet she did not make any other attempt to recall Frazier. If, as Hunter testified, Frazier was indeed one of his "best" drivers, it would be expected that Respondent would nevertheless undertake other efforts to get him back to work or at least to contact him personally instead of hiring drivers who had to be trained. Yet Respondent simply let one of its "best" drivers get away while it desperately needed experienced drivers during the period after the strike. Respondent's position—and the testimony of its witnesses in support of that position—is unpersuasive. In short, the failure of Respondent to contact Frazier is consistent with his testimony that he was told he was fired. At the very least, Respondent caused Frazier to believe that he had been discharged or that his continued employment was questionable because of his protected and union activity. See *Pennypower Shopping News, Inc.*, 253 NLRB 85 (1980).[6]

[5] Respondent suggests that it tolerated Brown for some 6 or 7 months in 1979, before the strike and after his alleged incompetence was revealed, because it needed drivers. This argument is specious. Respondent admittedly needed experienced drivers throughout the period after the strike when it was hiring people off the street, including a woman recommended by Brown himself who had no experience except for driving a schoolbus and who did not even finish her probationary period. Moreover, Mrs. Carruthers testified that, after the strike, she recalled an employee who was laid off in August. If there was a layoff in August 1979 and Brown was not laid off, it is obvious that Brown was deemed an acceptable employee until the onset of the strike. Nor was he recalled after the strike despite Respondent's need for experienced drivers and his constant appearance at Respondent's premises seeking work.

[6] I do not reach the General Counsel's alternative theory that, if Brown and Frazier were not discriminatorily terminated, they were not properly recalled as returning strikers under the principles of *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), and *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). In view of my disposition of the Brown and Frazier allegations, they are entitled to immediate reinstatement and

Continued

2. The improper recall of striking employees

a. *General discussion*

It is well settled that an employer who refuses to reinstate economic strikers upon their unconditional offer to return to work discourages them from exercising their rights under the Act and is guilty of an unfair labor practice unless he can show "legitimate and substantial business justifications" for his actions. *N.L.R.B.* v. *Fleetwood Trailer Co., Inc., supra.* Since an employer has substantial and legitimate business justification for hiring replacements in order to continue his business during an economic strike, he may lawfully refuse to reinstate strikers whose positions are occupied by such replacements when the strike ends. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938); *N.L.R.B.* v. *Fleetwood Trailer Co., Inc., supra.* However, economic strikers who unconditionally apply for reinstatement when their positions are filled by permanent replacements are entitled to full reinstatement upon the departure of replacements or when jobs for which they are qualified become available, unless they have in the meantime acquired "regular and substantially equivalent employment" or the employer can prove that the failure to offer full reinstatement was for legitimate and substantial business reasons. *The Laidlaw Corporation, supra.* See also *Brooks Research & Manufacturing, Inc.*, 202 NLRB 634, 636 (1973).

The evidence in this case clearly shows that, on November 13, 1979, the Union offered, on behalf of all striking employees, that those employees cease striking and return to work unconditionally. The evidence also shows that Respondent accepted this offer as part of an overall strike settlement agreement and agreed to return the striking employees to work "as positions became available." Mrs. Carruthers thereafter acted in accordance with this agreement by recalling striking employees when she needed to fill job openings. Thus, as of November 13, 1979, all of Respondent's striking employees were entitled to be recalled as positions became available in accordance with the *Fleetwood* and *Laidlaw* decisions.[7]

The General Counsel takes issue with Respondent's policy of recalling the strikers in three general classifications, Winchester mixer-drivers, Collierville mixer-drivers, and gravel truckdrivers. The General Counsel urges that there should only be two categories: mixer-drivers and gravel truckdrivers. I agree. The parties submitted evidence concerning whether or not there was interchange among the drivers between Winchester and Collierville. There was some interchange but I do not find that evidence to be particularly relevant. The question is whether the mixer-drivers should have been recalled to open positions at either location. This turns on whether the drivers were qualified to drive out of either location and whether the jobs were substantially equivalent. I believe they were. There is no evidence that any particular driver was qualified to drive out of one location but not the other or that the trucks or the jobs were significantly different. There was testimony that the Collierville location serviced residential construction and that its supervisor was more particular about his drivers than the Winchester supervisor, but it was not shown that these factors disqualified one set of drivers from working at the other location. Indeed, Winchester openings became available first after the strike ended and many of these jobs were filled by inexperienced people. Certainly the Collierville drivers were qualified to fill those positions. In short, there was no legitimate reason on this record to distinguish between Winchester and Collierville drivers when mixer-drivers were considered for open positions at either location. Since the General Counsel concedes that the gravel truckdrivers were properly considered separately, my determinations herein shall assume that the truckdrivers should have been recalled in only two categories, mixer-drivers and gravel truckdrivers.

The General Counsel contends that the strikers should have been recalled in order of seniority. Respondent's lists were essentially alphabetical. Respondent never has operated under a seniority system and it successfully resisted a proposal by the Union that the strikers be recalled on the basis of seniority. There is no requirement—in the absence of an agreement or evidence of past practice—that an employer must recall returning strikers back to work on the basis of seniority. All that is required is that the employer recall its employees on a nondiscriminatory basis. I therefore reject the General Counsel's contention and shall assume that Respondent has the right to recall employees in any order it wishes, absent discrimination on the basis of union or protected concerted activity.

Respondent also alleges that two employees, Frazier and Fletcher, acquired regular and substantially equivalent employment prior to the time it hired new employees in their job classifications and thus ceased to be employees at the time that jobs became available for them, citing *Little Rock Airmotive, Inc.*, 182 NLRB 666 (1970), enforcement granted in part and denied in part 455 F.2d 163 (8th Cir. 1972). In that case the Board stated:

> The question of what constitutes "regular and substantially equivalent employment" cannot be determined by a mechanistic application of the literal language of the statute but must be determined on an *ad hoc* basis by an objective appraisal of a number of factors, both tangible and intangible, and includes the desire and intent of the employee concerned. Without attempting to set hard and fast guidelines, we simply note that such factors as fringe benefits (retirement, health, seniority for purposes of vacation, retention, and promotion), loca-

backpay from the date of Respondent's unlawful termination of them. See *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979), enforcement denied on other grounds 612 F.2d 6 (1st Cir. 1979).

[7] The General Counsel argues that, on November 5 and 6, 1979, a number of named employees made offers to return to work which were unconditional. In view of the November 13 offer and agreement and since no jobs were filled by new employees in the interim, I fail to see the significance of the General Counsel's position. Furthermore, it is clear on this record that the strikers made their offers to return after a meeting with the union representative who sent the November 2 telegram offering that the employees would return to work if Respondent withdrew an unfair labor practice charge it had filed. The telegram offer was thus conditional and I find that the individual offers to return on November 5 and 6 were made pursuant to the Union's conditional offer. Accordingly, the November 5 and 6 offers to return to work were conditional and could not have affected the striking employees' reinstatement rights under the Act.

> tion and distance between the location of the job and an employee's home, differences in working conditions, et cetera, may prompt an employee to seek to return to his old job. [182 NLRB at 666.]

In the instant case, I have found that Frazier was unlawfully terminated. Thus, he remains an employee and must be offered reinstatement whether or not he obtained other employment after his termination and he must be awarded backpay to the extent of his loss of earnings from the date of his unlawful termination. As to Fletcher, I find, *infra*, that he had indeed obtained other employment before Respondent started hiring new employees and that he was not entitled to reinstatement for that reason. See *H. & F. Binch Co.*, 188 NLRB 720, 725–726 (1971), enforcement granted as modified 456 F.2d 357 (2d Cir. 1972).

Respondent attempted to limit its liability by sending letters in June 1980 to all employees by certified mail offering them jobs in Strayhorn, Mississippi, or confirming job offers previously made by telephone. The letters were sent with return receipt requested. None of the employees accepted the jobs. Most cited transportation problems. The Strayhorn location was some 40 miles from the homes of the employees and from the situs of their former jobs. Respondent did not offer to provide transportation to Strayhorn. The jobs did not involve driving the same kind of truck they had driven in their former jobs. There is no evidence as to whether the pay and benefits of the Strayhorn jobs were the same as for the jobs in the Memphis area. In these circumstances, I find that the May and June 1980 Strayhorn job offers were not offers to substantially equivalent jobs and did not satisfy Respondent's requirements under *Laidlaw* or toll backpay.

The main issue presented herein with respect to the recall of the strikers is whether Respondent's telephone calls to the strikers were sufficient or whether more—letters or even certified mail—was required. I find that, in the circumstances of this case, the telephone calls were not sufficient and that letters, at least, were required to be sent to the employees in order to satisfy the requirements of *Laidlaw*.

There is no specific rule under Board law requiring that an offer of reinstatement take any particular form. However, it must be reasonably calculated to communicate the offer. In order for an employer to discharge his obligation to offer reemployment to a striking employee who has unconditionally requested reinstatement, the employer "must present probative evidence showing a good-faith effort to communicate such an offer [of reinstatement] to the employee . . . [and] must show that [it] has taken all measures reasonably available to [it] to make known to the striker that he is being invited to return to work." *J. H. Rutter-Rex Manufacturing Company, Inc.*, 158 NLRB 1414, 1524 (1966), enfd. as modified 399 F.2d 356 (1968), reversed 396 U.S. 258 (1969).

Telephone calls to an employee's residence and messages left at his home are insufficient to communicate an offer of reinstatement if they do not in fact reach the employee. *J. H. Rutter-Rex Manufacturing Company, supra.* Offers transmitted by ordinary mail, like any other method, are sufficient where the offer is received by the employee. However, it is unclear, under Board precedent, whether letter offers sent by ordinary mail are sufficient when there is testimony by the employees that they were not received. In *Rutter-Rex, supra*, the Board stated, in dictum, that offers sent by ordinary mail were not sufficient. See also *Standard Materials, Inc.*, 237 NLRB 1136, 1146 (1978), enfd. 604 F2d 449 (5th Cir. 1979), where the Board found, in agreement with the Administrative Law Judge, that an employer who left two messages at an employee's home did not satisfy its obligation to communicate an offer of reinstatement to that employee where it had made offers to other employees by certified mail and had failed to show why it could not do the same for the particular employee involved. In the course of the Administrative Law Judge's discussion of this issue, he stated that transmission of offers by ordinary mail was insufficient when the letter was not received by the employee. He cited *N.L.R.B.* v. *Jay Company, Inc.*, 227 F.2d 416, 419 (9th Cir. 1954), where the court affirmed the Board's view that the sending of a registered letter which was not actually received was insufficient to satisfy an employer's obligation to reach the employee. Backpay was tolled, however, because the letter was "mailed in good faith." Also cited was *New York Handkerchief Manufacturing Company* v. *N.L.R.B.*, 114 F.2d 144, 148 (7th Cir. 1940), cert. denied 311 U.S. 704, where the court refused to find a letter offer of reinstatement valid where there was no proof as to who wrote the letter or whether it was mailed and the employees denied receiving letters. Finally, the Judge cited *Monroe Feed Store*, 122 NLRB 1479, 1480–81 (1959), where a letter offer sent to an employee's last known address was returned unopened because the employee had moved. That letter, however, was sent by registered mail and the Board's determination that the letter did not toll backpay was based on the fact that the employer failed to avail itself of other opportunities to contact the employee. See also *Marlene Industries Corporation, et al.*, 234 NLRB 285, 288 (1978).

However, in *General Iron Corp.*, 218 NLRB 770, 771 (1975), the Board rejected "the novel idea that offers of reinstatement must be served by registered mail, return receipt requested." The Board noted that ordinary mail was sufficient for service of briefs in Board proceedings and stated that "there is no *per se* rule that the validity of an employer's offer of reinstatement to an employee depends on the employee personally receiving a letter offer." The latter statement cited two cases, one involving the sending of a letter to the last known address of an employee who had in fact moved but not notified his employer (*Rental Uniform Service*, 167 NLRB 190, 197–198 (1967)) and the other involving the termination of backpay for two employees who were sent letters to their last known addresses which were returned undelivered and "the reason for such undelivery was not disclosed by the record." (*Adams Book Company, Inc.*, 203 NLRB 761, 769, fn. 31 (1973).) The Board also noted that the employee in *General Iron* testified that he had never received the reinstatement offer, but observed that

this is "essentially a matter of proof best determined in the compliance stage." (218 NLRB at 771.)

It appears from the above analysis of precedent that telephone calls, messages, and other efforts short of mailing letters which do not actually reach employees are not sufficient to satisfy the employer's requirement to communicate offers of reinstatement to employees. In the instant case, no letters were sent to most of the strikers before new employees were hired. As to those employees, clearly, Respondent has not satisfied its obligation to communicate offers to striking employees. At the very least these employees should have been sent letters by ordinary mail. Respondent had their addresses and it mailed them letters in mid-November 1979 when it sought to communicate to them its view that they should not vote for the Union in the Board-conducted election. These employees were thus not properly recalled or reinstated.

As to several other employees, letters were sent by ordinary mail—not certified or registered mail and not with return receipt requested. I do not consider the June 2, 1980, letters which were sent by certified mail and with return receipt requested because they were sent well after new employees were hired after the end of the strike and they contained offers which were not for substantially equivalent jobs. Employees Tart and Burke were sent letters at their last known addresses but they had moved and had not notified Respondent of their change of address. I view these letters as having tolled any backpay liability essentially because the employees were responsible for the noncommunication of the reinstatement offers. Employee Mosely was sent a letter to the wrong address in circumstances which showed that the error was Respondent's and that Respondent made no further efforts to reach him even though it knew it had a wrong address and had independent contact with the employee. The last two situations where letters were sent to employees are more difficult and point out the difference in making offers by ordinary mail rather than by certified or registered mail with return receipt requested. W. G. Williams was sent a letter to his last known and proper address. There was no response to the letter. Williams did not "remember" receiving it. Employee Sidney Moore was also sent a letter to his last known and proper address. There was no response but he testified he did not receive such a letter. The letters were not returned and Respondent obviously assumed the letters were received. These two cases point out the problem mentioned by the Board in *General Iron, supra*: The sender who uses ordinary mail runs the risk of not being able definitely to prove service, particularly when the employee testifies he did not receive the letter. In this posture of the evidence, the question must be resolved by considering whether the employee's denial that he received the letter is credible, whether, in all the circumstances, the respondent made reasonable alternative efforts to reach the employee, and whether the employee wished to return to work. As I discuss in more detail when I consider their individual cases, weighing the above factors with respect to Moore and Williams, I find that they are not entitled to backpay and reinstatement.

Respondent also argues, as a general matter, that it had legitimate and substantial business reasons for hiring new employees before recalling its strikers. The arguments are not persuasive. First, Respondent argues that, in late 1979 and early 1980, it had need to fill concrete orders on an immediate basis and had need for immediate new hires. This alleged sense of urgency is refuted by the evidence that new drivers were being hired who were so inexperienced that they had to be trained by other drivers, some for as long as 2 weeks. Some of these new drivers did not even survive their probationary period. The suggestion of urgency is also refuted by Mrs. Carruthers' testimony that in December and January she was not in a "big hurry" to obtain drivers because it was midwinter and the trucks "could sit for a while." Moreover, new positions were becoming available over a period of time and, even if letters did not reach a person for the few jobs which became available in December, they certainly could have been used to notify the striker of positions which would have become available in January or thereafter. Ordinarily an employee must be granted a reasonable period of time to accept an offer of employment. See *Home Insulation Service, a Division of Sunstate Wholesalers*, 255 NLRB 311, 317, fn. 2 (1981). Respondent also argues that there was a decrease in the volume of business after Respondent resumed operations in the spring of 1980. This argument is irrelevant since *Laidlaw* requires that an employer recall strikers before hiring new employees. Whatever its business needs, Respondent did in fact hire new employees instead of strikers. And so long as vacancies became available strikers had a right to preferential treatment before new people were hired. Finally, Respondent urges that strikers herein did not keep Respondent informed of their availability for employment. This too is irrelevant. Under *Laidlaw*, once a valid offer to return to work unconditionally is made, the burden is on the employer to recall the employee. As this record shows, there was a blanket offer to return made by the Union and accepted by Respondent in the strike settlement agreement of November 13, 1979. In addition, many of the strikers made individual efforts to contact Respondent. In these circumstances, Respondent's general arguments against the reinstatement of the strikers are without merit.

Turning to the individual strikers, I have already found that two of them were terminated for discriminatory reasons. Even if it were determined, contrary to my findings, that Brown and Frazier were not discharged, they were certainly not recalled and, in my view, the evidence shows that they were not recalled for discriminatory reasons. The failure to properly recall the other 26 strikers is influenced to some extent by Respondent's discrimination against Frazier and Brown. Respondent exhibited a hostility against the strikers which undoubtedly caused the Respondent to make less than full-fledged efforts to recall some of them. In addition to the failure to send most of the strikers letters or telegrams about job openings, despite sending them letters about the December election, Respondent hired inexperienced new employees instead of its old work force. In one instance, Respondent recalled a former striker, put him on

a different job, and fired him without so much as the least concern for putting him back on his old job. This evidence as well as the hostility of Hunter and Bobby Carruthers to the strikers themselves might well support the finding that the actual motive for Respondent's failure to properly recall all of the strikers was discriminatory. However, the General Counsel has not advanced this theory and thus I analyze each of the cases individually. Each of these employees struck and each—through his union—sought unconditional reinstatement to his former job. Some were actually reinstated. I have found that 19 employees, excluding Brown and Frazier, were not properly recalled or reinstated. Beginning on December 13, 1979, new people were hired for jobs to which the strikers were entitled; 11 of the 19 still have reinstatement rights. Eight were recalled although perhaps not as soon as they should have been. There is evidence that some employees who were not reinstated obtained other employment after new employees were hired but prior to the hearing. This, of course, does not excuse Respondent from making proper offers of reinstatement at the time vacancies arose. Nor do my findings take into account the order in which the strikers would have been recalled had they been recalled properly and in a nondiscriminatory manner. Obviously, this might affect the amount of backpay, if any, due to each employee. Any problems in this respect can be resolved in the compliance stage of these proceedings.

b. *The individual employees*

Earl Banks: At the time of the strike, Earl Banks was working as a mixer-driver stationed at the Winchester plant.

After the strike, Banks telephoned the plant and spoke to Hunter Carruthers on two occasions. The first conversation occurred around the last of November. Banks asked Carruthers if he had any work and Carruthers replied that he had no openings. Banks called again in December, approximately a week after the first phone call. In this conversation, Carruthers again stated that there was no work available.[8]

Banks testified that, on Saturday, March 15, John Nichols called his home and stated that he wanted Banks to come to work. Banks reported on Monday, March 17, at which time Nichols stated that no truck was available. Banks actually resumed work on April 1. Banks testified that he was unaware of any other attempts by Respondent to contact him.

Sally Carruthers testified that she called Banks on December 18 with regard to the two mixer-driver positions filled at Winchester on December 20 by new hires. At that time she left a message for him to call her. On January 13, Mrs. Carruthers again called Banks concerning mixer-driver positions at Winchester. She did not receive any answers on this occasion. She called Banks again on January 15 and received no answer. Mrs. Carruthers testified that she did not attempt to contact Banks concerning Winchester mixer-driver positions filled February 13 and 14 because "every time I tried to call him, I didn't get an answer. I had already left one message for him." Mrs. Carruthers stated that Larkin Harper found Banks and, on February 14, Banks called Respondent. She testified that he was reinstated the next time a mixer-driver was needed, on March 21, 1980.

Respondent did not properly recall Banks before hiring new employees as mixer-drivers.

Harvey Burke: Harvey Burke was a gravel truckdriver. In November 1979, Burke came to the Winchester plant and asked Hunter Carruthers about returning to work. Carruthers replied that he had no openings at that time but told Burke to check with him in the future. Approximately a week after this conversation, Burke called Hunter Carruthers and again asked him if he had an opening. Carruthers replied that he did not but to keep checking with him. Carruthers also stated that he would call Burke when he had an opening. Burke also testified that, approximately 2 weeks after the telephone conversation with Hunter Carruthers, he called Respondent's office and spoke to Sally Carruthers. He asked Mrs. Carruthers if she had any openings and she replied that at that time she did not. Burke was unsure of the exact date of this conversation, but testified that it occurred in November.

Burke testified that he did not receive any letters or phone calls from Respondent regarding his return to work. Burke also testified that he moved the summer before the strike and that he did not notify Respondent of this move. However, he stated that Respondent could still reach him at the same phone number and address because he had only moved next door and the residents of his old address were instructed to forward to him any mail he received.

Mrs. Carruthers testified that she attempted to call Burke on December 11 prior to the hiring of a new employee on December 12. At that time she was told that the telephone number was incorrect. A letter was sent to Burke on January 9 offering him a job eventually filled January 15 by a new employee. The January 9 letter stated, "We have a position open and would like for you to come back to work. Please call me at 853-7335, if you are interested." The letter was returned with the notation "not deliverable." Mrs. Carruthers testified that she did not make further attempts to contact Burke because she had already sent him a letter. Mrs. Carruthers testified that, on March 18, Burke contacted Respondent and provided a new address and telephone number and he was returned to work on March 25.

It is clear from the above that Respondent made appropriate and reasonable efforts to contact Burke about job openings as they became available. He was sent a letter to his last known address. However, he had moved and had not informed Respondent of his change of address and phone number. He is thus not entitled to any backpay.[9]

[8] On cross-examination, Banks was shown his pretrial affidavit in which he stated that he spoke to Bobby Carruthers and requested reinstatement in December or January. Banks explained that this conversation was in addition to his two telephone conversations with Hunter Carruthers.

[9] Respondent did not send Burke a letter prior to the hiring of a new gravel truckdriver on December 12, 1979, but there is every likelihood that a letter sent to the wrong address in December would have had the same result as that sent in January.

Mario Burks: At the time of the strike, Burks was employed as a mixer driver at the Collierville plant. Burks testified that he had no conversations with officials of Respondent concerning reinstatement after the strike and that he received no correspondence concerning this subject.

Burks testified that he has been living at his present address, 687 Buntyn, for 15 years and has had his present telephone approximately 8 years. He stated that, until June 1980, he maintained both a listed and unlisted telephone number and that Respondent had his unlisted number. He identified 774–8255 as his unlisted number. He testified that Respondent's dispatcher had his unlisted number and that Respondent had previously called him at that number.[10]

Sally Carruthers testified she mistakenly included Burks on her Winchester list of mixer-drivers. She stated that he should have been included on the Collierville list, but she treated Burks as a Winchester driver and made attempts to contact him only regarding available positions at Winchester. Mrs. Carruthers testified that, on December 18, she called Burks concerning mixer-driver positions filled by new employees at the Winchester plant on December 20, but that she was told his phone number had been changed to an unlisted number. She did not send Burks a letter at this time. Mrs. Carruthers did not call Burks in January because "his phone number was unlisted when I had called before." She stated that, prior to hiring new employees at Winchester on February 13 and 14, she sent Mose Harrison to Burks' house. He was unable to contact Burks. She also stated other people had been sent to Burks' home, but that Respondent could not contact him. Mrs. Carruthers' notes indicate that Mose "went to Dixie-Homes—talked to landlady and asked her to tell him to come to plant or call." Burks denied that he ever lived at a place called "Dixie-Homes." Mrs. Carruthers' notes also correctly lists Burks' address as 687 Buntyn and his phone number as 774–8255.

Since Respondent had Burks proper address and failed to notify him of a job offer by mail, Respondent failed properly to recall Burks before hiring new mixer-drivers.

Grafton Burton: Burton was working as a gravel truckdriver at the time of the strike. Burton testified that, after participating in the strike for about 2 weeks, he was informed at a meeting by Crutcher to report back to work the next Monday morning. Burton reported to the Winchester location on that Monday along with about 15 other striking employees. The employees came as a group, but Hunter Carruthers told them they were "new guys," and he talked to them one at a time. Burton met with Carruthers individually and told him that he was reporting back to work. Carruthers replied that he did not have anything for him to do, but that he would take his name and phone number and call him if anything came up.

Burton went back to the Winchester plant the next day and spoke to Hunter Carruthers. He told him that he had come back and was still looking for work. Carruthers replied that he still did not have anything for him to do and that he would call if anything came up.

Burton stated that he returned to work at Respondent on April 2. He was informed by another employee that Respondent was trying to get in touch with him. Burton then attempted to call Essie White. He reached White on March 24. At that time, White told Burton that, although he had not been attempting to contact him, two trucks were in the shop and that he should see Mrs. Carruthers. Burton went to the Collierville office that same day and spoke to Mrs. Carruthers. She told him Essie White would probably get in touch with him whenever one of the trucks came out of the shop. White contacted Burton on April 1 and told him to report to work the next morning. Burton went back to work on April 2. He testified that, to his knowledge, Respondent did not attempt to contact him about his reinstatement.

Sally Carruthers testified that she attempted to call Burton on December 11 concerning the position filled by a new employee on December 12 but received no answer. She also called Burton on January 9 and left a message for him to call her. New employees were hired as gravel truckdrivers on January 15, 23, and 24. On February 5, Mrs. Carruthers again called Burton about two gravel truckdriver positions, which were filled on February 7, but received no answer. Mrs. Carruthers said that she made no further attempts to contact Burton after February 5 because "I called twice and received no answer and had called once and left a message for him to call." Mrs. Carruthers testified that, as far as she knew, Respondent got in touch with Burton through two other striking employees and he came back to work on April 7.

Respondent failed properly to recall Burton before hiring new gravel truckdrivers.

Eddie Cowan: Before the strike, Eddie Cowan drove a mixer truck at the Winchester location. Cowan testified that he reported back to work on November 6 at the instruction of Union Representative Crutcher. He reported to Winchester and spoke to Hunter Carruthers. Cowan told Carruthers that he was ready to come back to work. Carruthers replied that Respondent did not have anything for him at the time and did not know when anything would be available. He also told Cowan that if it was up to him he would not put any of the strikers back to work. Hunter denied making this statement to Cowan.[11]

Sally Carruthers testified that, on December 18, she telephoned Cowan about positions filled by new employees on December 20. She used the telephone number provided by Cowan on his employee information card. The person who answered the phone told Mrs. Carruthers that Cowan had moved and his whereabouts were unknown. She testified that Nichols got in touch with Cowan on March 11, at which time Cowan pro-

[10] Burks testified that he is presently working for Schevenell, another concrete company, as a mixer-driver. He first began his employment at Schevenell in March 1980.

[11] I am not called upon to resolve this conflict in testimony although I note that Hunter's alleged statement is similar to statements made by Hunter Carruthers to other employees. He made a similar statement to Frazier. Cowan testified to several contacts with John Nichols and Larkin Harper after the end of the strike although some of his testimony seemed to contradict statements he made in a pretrial affidavit.

vided Respondent with a new address and phone number. Cowan testified that he had moved in November and that he gave Mrs. Carruthers his new address and phone number on March 18, 1980. He was reinstated on March 19, 1980, to a mixer-driver position.

It is clear from the above recitation of the facts that Respondent could not have contacted Cowan any sooner than it did. It was his responsibility to keep Respondent informed of his change of address and phone number. Since he did not do so, his reinstatement on March 19, 1980, was entirely proper and timely. Thus, Cowan is not entitled to any backpay.

Aubrey Fletcher: At the time of the strike Fletcher was working as a mixer-driver at Winchester. He testified that he made no contact with Respondent about his job after the end of the strike. John Nichols called him sometime in the middle of April 1980 and asked him if he wanted to return to work. Fletcher said he did not because "I had a job." That job was presumably the same one at American Ready Mix which he held on November 13, 1979. He was still working at American Ready Mix on the date of the hearing and he testified he began working there on November 13, 1979. Fletcher also testified that he worked on Saturdays. He made no further contact with Respondent after speaking with Nichols.

Mrs. Carruthers testified that she called Fletcher on December 19, 1979, and again in January 1980 and left a message for him to call her. She also testified that she called again on January 13, 1980, and that she was told by a woman who answered Fletcher's phone that he had a job at American Ready Mix. She told the woman to have Fletcher call her if he wanted to return to work for Respondent. Mrs. Carruthers' notes indicate she received a confirmation from Nichols about his conversation with Fletcher in March 1980.

My view of the evidence is that Fletcher had a regular and substantially equivalent job as of November 13, 1979, and thus was not in the status of a striker who had a right to reinstatement when vacancies first arose in December 1979. He confirmed this by his own testimony that he turned down an opportunity to return to work for Respondent in April 1980 because he had another job. This was the same job he had obtained on November 13, the day the strike ended. Nor is there any evidence that Fletcher made any individual efforts to contact Respondent about his old job, apart from being included in the blanket offer to return and the strike settlement agreement. Accordingly, Fletcher is not entitled to reinstatement or backpay.

William Harris: Harris was a mixer-driver at the Collierville plant. He did not testify at the hearing. Sally Carruthers testified that she talked to Harris on January 8, 1980, when he came to the Collierville office. She asked Harris if he was ready to return to work. Harris replied that he was not because he had a job driving a gravel truck in Mississippi. Mrs. Carruthers made no further efforts to contact Harris. In these circumstances, it is clear that Harris is not entitled to reinstatement. Although one gravel truckdriver was hired on December 13, 1979, who was not a striker, the General Counsel has not shown that Harris did not have the Mississippi gravel truck job at that point or that he would have been the one striking gravel truckdriver to have been recalled on December 13. Indeed, it is unlikely that he would have been since Mrs. Carruthers recalled striking employees basically in alphabetical order and she would not have reached Harris. In these circumstances, Harris is not entitled to any backpay.

Bobby Jones: Bobby Jones was a gravel truckdriver before the strike. Jones spoke to Hunter Carruthers about returning to work on November 5, 1979. No jobs were available and Jones thereafter resumed picketing. Jones had no further conversations with any officials of Respondent until the following March. In early March, after being notified by other employees that Respondent was looking for him, Jones went to the Collierville office and spoke to Sally Carruthers. He was reinstated at this time.

Sally Carruthers testified she attempted to call Bobby Jones on December 11 concerning the gravel truck position filled on December 12, and left a message that a position was available for Jones. She also testified that she attempted to contact Jones on January 9 by calling and leaving a message for him with regard to positions filled on January 23 and 24. On February 5, she called and left a message a third time for a position which was filled on February 7. Mrs. Carruthers testified that she made no attempt to contact Jones concerning a gravel truck position filled on February 25 because she had left three messages for him to call. On February 27, according to Mrs. Carruthers, Jones contacted her and was put back to work on March 4.

Bobby Jones should have been recalled before new gravel truckdrivers were hired and was thus not properly recalled.

Columbus Jones: At the time of the strike Columbus Jones was employed as a gravel truckdriver. However, he was trained to drive either a gravel truck or a mixer, and, following his recall, Jones was transferred from a gravel truck to a mixer.

Jones testified that he has been living at his present address for 2 years. He further testified that he had given his mother's phone number to Respondent and that he could be contacted through that number.

He testified that he first made an attempt to go back to work about 3 or 4 weeks after the strike ended. He called Hunter Carruthers on the telephone and asked him if there was any work. Carruthers replied that there were no openings. About 2 weeks after this conversation, Jones called the Collierville office and spoke to Sally Carruthers. When Jones asked her about coming back to work, Mrs. Carruthers stated that Respondent did not have any openings. Jones also testified that, after these conversations, he contacted Essie White and asked him about coming back to work. White stated that he did not think that Jones would be able to come back to work there again, but he did not explain why.

In April 1980, Jones contacted Mose Harrison at Collierville and asked him if he could drive a gravel truck. Harrison replied that he would probably have such an opening in a few weeks and that he would have an opening for a mixer-driver sometime later. Jones stated that

he believed this conversation took place between April 8 and 10. About 2 weeks after this conversation with Harrison, Jones was contacted through Harvey Burke, another striking employee, and was told to come to Collierville to see Harrison. He did so, and was put to work the next week. Jones was reemployed as a gravel truckdriver and after a month was transferred to a mixer.

Jones testified that he received no mail from Respondent during the time he was off work and received no messages that Respondent had attempted to contact him. Jones also testified that he moved from the address he had given Respondent when he was hired in March 1978 to his present address prior to the strike. He also testified that he informed Hunter Carruthers of his move prior to the strike and after the strike began. This testimony was not contradicted.

Sally Carruthers testified that Columbus Jones' phone number was the same number as that of Bobby Jones, another striking employee and Columbus Jones' brother. Therefore, when she called that number on December 11 concerning a position filled by a new employee on December 12, she left a message for both Bobby Jones and Columbus Jones to call her back. She also called Jones on January 9 and left a message concerning positions filled on January 15, 23, and 24 by new employees. Mrs. Carruthers also testified that she called and left a message for Columbus Jones on January 19, but the notes she kept concerning her effort to contact striking employees do not indicate that such a contact was made. She called Columbus Jones again on February 5 about a position filled on February 7, and left a message for him to call her. At that time, she stated that she was told Jones had moved and the person to whom she spoke did not know his new address. She stated she did not attempt to contact Jones regarding a gravel truckdriver position filled on February 25 because she had left three messages for Jones to call her. Mrs. Carruthers' notes indicate that, on March 21, Jones came in and gave her a new address and phone number. Jones returned to work on April 8, 1980.

Respondent never tried to reach Columbus Jones by mail. Mrs. Carruthers apparently had a wrong address for him. She testified that she first learned he had moved in February 1980. However, Jones credibly testified that he moved prior to the strike and he gave his new address to Hunter Carruthers in one of their conversations. The last of these conversations was in November 1979. Respondent failed properly to recall Columbus Jones before it hired new drivers.

Nathaniel Jones: At the time of the strike Jones was working as a mixer-driver at the Collierville location. Jones testified that he contacted Respondent several times in November 1979 about getting his old job back but to no avail. He did not thereafter contact Respondent. Nor was he contacted by Respondent until June 1980 when he was sent a letter by Respondent offering him a job. Jones called Sally Carruthers who told him that the position referred to in the letter was a job driving a truck in Senatobia, Mississippi. Jones replied that he was not interested in that offer because he was a mixer-driver. Jones also testified that he has been employed at Schevenell Ready Mix since April 1, 1980, and that he could not accept Respondent's June offer because he was working for Schevenell. Jones also testified that his refusal was also based on the fact that the Senatobia position would require him to travel a much longer distance to work than he had traveled when working at Collierville.

Jones testified that he has lived at his present address for the last 7 years. He also testified that he gave his address and phone number to Respondent when he was first hired.

Sally Carruthers testified that she called Nathaniel Jones on January 14 and spoke to a woman who said that Jones was working at a Travelodge. Mrs. Carruthers left a message for Jones to call her. Jones denied working at Travelodge in January. He did testify that he began working there in March 1980. Mrs. Carruthers made no further efforts to contact Jones although she testified that Mose Harrison and other employees tried to contact him as far as she knew.

Respondent failed properly to recall Nathaniel Jones before hiring new mixer-drivers.

Robert E. Jones: Robert E. Jones was employed by Respondent as a gravel truckdriver before the strike. Jones testified that he made a personal offer to return to work to Sally Carruthers in a telephone conversation sometime during January 1980. He asked Mrs. Carruthers if Respondent had any openings and told her that he needed a job. She replied that there was nothing available.

Sally Carruthers testified that she attempted to contact Jones on December 11 regarding a gravel truckdriver job filled by a new employee on December 12, but she received no answer. On January 9, 1980, she telephoned Jones and left a message, but again received no response. New employees were hired as gravel truckdrivers on January 15, 23, and 24. Mrs. Carruthers next attempted to contact Jones on February 5 when she called again and left a message. New gravel truckdrivers were hired on February 7 and 25. According to Mrs. Carruthers, Jones contacted Respondent on February 25 and was put back to work the next day.

According to Jones, in March 1980, he went to the Collierville plant, spoke to Mose Harrison, and asked him about a job. Harrison told him that the only position available was a job involving both driving a truck and fixing tires. Jones had never repaired tires before the strike and protested this aspect of the job. He asked to have his old truckdriving job, but Harrison told him this was the only job that was open. Jones accepted the job.

Jones testified that his tire repair duties occupied about 4 hours a day. He drove a gravel truck the remainder of the time. The job required Jones to take tires off a truck, use a hammer to get the rim off the tire, repair the tube, and replace the tire. Jones testified that the work was very different from driving a truck and required bending, lifting, and manual strength.

Jones worked under these conditions for about 4 weeks. At that time, he requested a transfer to a gravel truck because the tire repair job was injuring his back. Harrison refused to move him from the position, and told Jones, if he could not do the job, he did not need him. When Jones arrived at work the next day, he found

that another driver was in the truck he had been driving, and he was told to go home. The truck that Jones had requested was assigned to a newly hired employee. Harrison essentially confirmed Jones' testimony but added that, when Jones refused to continue to repair tires, he was fired.

Jones should have been recalled before Respondent hired new employees for gravel truckdriver positions. His reinstatement on February 25, 1980, was not to a substantially equivalent position. Fixing tires was a substantial part of Jones' new job and it involved bending and lifting. The job caused him back problems. The job was so different from his prior full-time truckdriver's job that Jones received 10 cents more per hour in the new position. The job to which he was reinstated was thus a substantialy different job from that which he had prior to the strike and it does not satisfy the reinstatement requirement under *Laidlaw*. The fact that Jones was discharged from that job for refusing to perform those very duties which were different from his former job is of no consequence. Jones was thus not properly offered or granted reinstatement.[12]

McQuirin Malone: Malone worked as a gravel truckdriver at the time of the strike. He testified that, while working for Respondent, he lived with his aunt at an address on Gaston Street. He stated that he provided Respondent with not only this Gaston Street address, but also with the address of his niece. Malone stated that his aunt moved from Gaston Street in July 1980. Mrs. Carruthers' notes indicate that she had the Gaston Street address for Malone.

Malone testified that, approximately 2 to 3 weeks after the strike, he was contacted by Larkin Harper who told him to report to the Winchester facility. Malone presented himself at Winchester, but was told by John Nichols that the truck which they thought would be out of the shop was not yet available. He directed Malone to Collierville. Malone then proceeded to the Collierville plant, where he filled out a timecard and punched in. He was given a gravel truck and made two trips to the gravel pit. After his second trip, Malone went to the office to turn in his ticket. Joe Carruthers, who was present in the office, asked the shipping clerk who Malone was and apparently refused to let him work. After he left the office, Malone was told by Mose Harrison that there was no truck for him to drive. He told Malone to go back to Winchester. Malone protested but he proceeded back to Winchester where he spoke to John Nichols. Nichols told him that a truck was in the shop, and, when it was repaired, he would call Malone. Malone then left. Malone testified that he was never thereafter contacted by Respondent.

Malone testified that he had made no attempt to contact Respondent in 1980, and that he had moved to Byhalia, Mississippi, after the first of the year. Malone also testified that Respondent could have contacted him through either his aunt or his niece. He testified that, after his move, he was in contact with his niece on the average of two to four times a month and that he received all the mail addressed to him which came to his aunt's address.

Sally Carruthers testified that, on December 11, she called Malone about a position filled by a new employee on December 12. According to Mrs. Carruthers a female answered the phone and told her that Malone was working in Mississippi. Mrs. Carruthers stated that she thought the person said he was running a club. Mrs. Carruthers testified she then told the person that, if Malone wanted to come back to work, he should call her. Malone denied that he had ever run a club in Mississippi. Mrs. Carruthers also testified that she did not call Malone in January about gravel truckdriver positions filled during that month by new employees because she assumed he was not interested based on his failure to return her call and the information she received at that time.

It is conceded that Malone was not sent a letter asking him to return to work when Respondent began hiring new employees in December 1979. Mrs. Carruthers had his proper address at this time. In these circumstances, it is irrelevant that Malone moved sometime in 1980. Even after his move, a letter would have reached him since the address which Respondent had for Malone was that of his aunt who forwarded him his mail. Malone was thus not properly offered reinstatement.

Steve McClain: At the time of the strike McClain was working as a mixer-driver at the Collierville location. McClain testified that Respondent did not attempt to contact him after the strike until he received a call from Sally Carruthers about the openings at Strayhorn in May or June 1980. McClain refused the offer because the job was in Mississippi and he was a mixer-driver. McClain subsequently received a letter from Mrs. Carruthers dated June 2, 1980, confirming their telephone conversation. The letter stated, "You would not accept this position because of the location of the job." McClain has had no further contact with Respondent.[13]

Sally Carruthers testified that she called McClain on January 21 and left a message for him. She called McClain again on January 24 and was told that McClain was working in Covington. McClain denied that he ever held a job in Covington. At that time she left another message. Mrs. Carruthers testified that McClain turned down the Strayhorn job offer on May 30, 1980, on the grounds that he was a mixer-driver and that the job was "out of his district." She claimed that she mentioned the possibility of employees riding to Senatobia on gravel trucks from Winchester, but also told him that Respondent would not be responsible for transportation.

Respondent failed to recall McClain before hiring new mixer-drivers. He was thus not properly recalled. It is possible that McClain would not have been reached for recall even had Respondent filled vacancies with strikers after December 13, before starting his job with Deal

[12] Jones' earnings while he was employed at Respondent will of course offset the amount of backpay he is owed. The specifics of Respondent's liability can be determined at the compliance stage of these proceedings.

[13] McClain testified that, in his conversation with Mrs. Carruthers, there was no mention of means of transportation to Senatobia. He testified that it is approximately 22 miles from his home to the Collierville plant. He also testified that he has been working as a driver for H. B. Deal Construction since March 3, 1980.

Construction in March 1980. Whether this is so and whether the Deal job constituted regular and substantially equivalent employment is a matter for compliance.

Edward L. Moore: Moore was a gravel truckdriver at the time of the strike. He testified that he called Sally Carruthers at the Collierville office at some time around Thanksgiving. He asked her if he could come back to work. Mrs. Carruthers replied that Hunter was in charge and that Moore would have to see him. Moore telephoned Hunter Carruthers the same day and told him that he wanted to come back to work. Carruthers replied that he did not have an opening, but that he still had the telephone number Moore had given him when he spoke to Hunter in early November. He told Moore that if he had an opening he would call Moore. Moore telephoned Hunter Carruthers again about a week later and asked him if he had an opening. Carruthers replied that he did not have one yet and, if he did, he would get in contact with Moore.

Moore testified that he was recalled to work on March 31, 1980. He was informed by Grady Fox, another employee of Respondent, that a gravel truck was available at Collierville. Moore telephoned Sally Carruthers who told him that he should see Mose Harrison. Moore then went to Collierville, talked to Harrison, and was put back to work.

Sally Carruthers testified that she called Moore on December 11 concerning a position filled by a new employee at that time and received no answer. She called and left a message for Moore both on January 9 and February 5. Mrs. Carruthers testified that she did not attempt to contact Moore concerning a gravel truckdriver position filled by a new employee on February 25 because "I had left two messages there and called once and didn't get an answer." She testified that, on March 20, Moore contacted Respondent and provided a new phone number. Moore was recalled on March 20.

On cross-examination, Moore stated that he gave Mrs. Carruthers his phone number on March 20, 1980. He testified, however, that this was the same telephone number he gave to Respondent when he started work on March 20, 1979, and his number has never changed since then. Mrs. Carruthers' notes indicate a different phone number next to Moore's name. There is a subsequent notation with Moore's number and the date March 20. It is unclear to me whether Respondent's records were in error or whether Moore gave a wrong number in March 1979 when he was first employed. It is clear, however, that Moore's address never changed. The address which appears on Mrs. Carruthers' notes is the same address Moore gave at the hearing in this case.

Because Moore should have been recalled—by mail—before new gravel truckdrivers were hired, he was not properly recalled.

Sidney Moore: Moore was a gravel truckdriver. He lives in Holly Springs, Mississippi. In early November, he spoke to Hunter Carruthers twice about returning to work. Hunter told Moore he had no openings but took his phone number. Moore made no other efforts to contact Respondent.

Moore was not recalled until May. He testified that Grafton Burton, his brother, told him that Mose Harrison had inquired about him reporting for work. The next day, Sally Carruthers called and left a message for Moore to call her. Moore drove to the Collierville office the same day and spoke to Sally Carruthers. Mrs. Carruthers told him she had an opening on a gravel truck and called Mose Harrison to verify that Moore could drive the truck. Harrison came to the office and told Moore he could begin work in the morning. Moore returned to work the next day.

After his recall, Moore worked for Respondent for 2 days. At that point, Respondent decided to transfer some of its trucks to the Senatobia gravel pit. Moore went to Senatobia the next evening, but conditions there were muddy, and a dragline used to load the trucks was broken. Moore asked Bobby Carruthers if he should come in the next day. Carruthers replied that there was no use coming in because it was too muddy and because of the broken dragline. Carruthers told Moore he would let him know when to report. Moore testified that he has had no further contact with Respondent.

Sally Carruthers testified that she attempted to call Moore on December 11 about a position filled by a new employee on December 12, but she received no answer. Mrs. Carruthers also called Moore on January 9 and received no answer. At this point, she sent a letter which stated, "We have a position open and would like for you to come back to work. Please call me at 853-7335 if you are interested." Mrs. Carruthers testified that this letter referred to a job filled on January 15 by a new employee and also for positions filled by new employees on January 23 and 24. There was no response to this letter. Moore testified that he did not receive a letter addressed to him dated January 9, 1980. On February 5, Mrs. Carruthers called Moore about a position filled by a new employee on February 7. She stated that she was told by the person who answered the phone that Moore was working in a college in Holly Springs. She left a message that he should return her call.[14] Mrs. Carruthers testified that she made no further efforts to contact Moore because "I had sent him a letter and called once and left a message and called twice and didn't get an answer."

Mrs. Carruthers' notes indicate that Moore called Respondent on May 5 and was put back to work on May 7. Mrs. Carruthers testified that, after his recall, Moore was assigned to work in Senatobia. She stated that he worked for 2 or 3 days, then was laid off because a dragline was broken. She testified that Moore was supposed to come back to work as soon as the dragline was repaired, but he never came back. Mrs. Carruthers testified that she attempted to contact Moore at least seven times, but he never called her back. She did not attempt to write him. She stated that she considered his status at that time to be "voluntary quit."

Moore denied receiving the January 9 letter addressed to him at his proper address offering him a job with Respondent. The letter was sent by ordinary mail. There was no response to the letter and it was not returned to the sender. Moore's denial seemed genuine and he was not shown to be an unreliable witness. I also credit Mrs.

[14] Moore denied that he ever worked at a college in Holly Springs but he did testify that he had held part-time jobs after the end of the strike.

Carruthers who testified that she called Moore's home in February and left a message for him to call her. Her testimony was supported by her notes. Moore did not respond to the message. It is, of course, possible that he did not receive the message. However, I find and conclude that Respondent made reasonable and adequate efforts to contact Moore and that it is likely that Moore did not respond because he did not wish to return to work for Respondent. This is also shown by other evidence. During the period in which Mrs. Carruthers was trying to reach Moore, he held part-time jobs. Mrs. Carruthers tried to reach him in February after having sent the letter. Moore did not respond to a message left for him to call and when he was finally contacted, through his brother, in early April, he reported for work, worked for 2 or 3 days, was laid off because of bad working conditions, and never returned or contacted Respondent even though Mrs. Carruthers repeatedly tried to reach him by telephone.

In these circumstances, I find that Respondent has satisfied its obligation to recall Moore and he is not entitled to reinstatement. Nor was it shown that Moore would have been recalled earlier than January 9, the date that the letter was sent to Moore. Respondent was recalling employees in alphabetical order and would not have reached Moore. Moore is thus not entitled to any backpay.

B. J. Mosely: At the time of the strike, Mosely was working as a mixer-driver at the Winchester plant. Mosely stated that he has lived at his present address, 952 South Fourth Street, Apartment 6, for 9 years and that he provided Respondent with his address and phone number when he was first employed.

Mosely testified that, in February 1980, he spoke with Bobby Carruthers at the Collierville plant. He had previously attempted to talk with John Nichols concerning reinstatement but was told by Nichols that he had to speak with Carruthers. He told Carruthers that he had come to see him about going back to work. Carruthers replied that at the present time he did not have work for anyone, but that he would call some of the employees back when work became available. Mosely was not cross-examined and his testimony was not controverted.

Mrs. Carruthers testified that she called Mosely several times on December 19 concerning a position filled by a new employee on December 20, but she received no answer. Mrs. Carruthers also sent a letter to Mosely on December 19. The letter was addressed "952 Goforth" and read, "We have a position open and would like for you to come back to work. Please call me at 853-7335 if you are interested." This letter was returned because there was "no such address."

Mrs. Carruthers testified that she attempted to call Mosely on January 13 and 15 regarding mixer-driver positions filled during January, but she received no answer on either occasion. She testified that she did not attempt to call Mosely again because she had called on three different occasions and did not get any answer and that she also had sent him a letter. She did reach Mosely around the end of May and asked him whether he would accept one of the jobs in Strayhorn. He told her that he had just started working for another employer but was noncommittal about the offer. Mrs. Carruthers also told Mosely that she had previously sent him a letter which was returned. Mosely gave her his correct address and she sent him a registered letter confirming their conversation. Mosely received the letter but made no further contact with Respondent.

It appears that Respondent's December 19 letter to Mosely carried an erroneous address. Both Mrs. Carruthers' notes and the letter show Mosely's address to be "952 Goforth." His correct address is 952 South Fourth Street, Apartment 6. He had lived there for 9 years and this was the address he had provided to Respondent when he was first employed. The similarity of the two street addresses leads me to conclude that Respondent was lax in transposing Mosely's correct address to Mrs. Carruthers' notes and to the letter sent to Mosely. Mosely's employment records are not in evidence. An employer should be held to due diligence in contacting employees at their proper address when making job offers. In this case Respondent must be found to have failed to use due diligence in obtaining Mosely's correct address which I must presume, from Mosely's uncontradicted testimony, was given to Respondent. Surely, after the letter was returned because it was sent to a nonexistent address, Respondent could have and should have made other efforts to ascertain Mosely's correct address. Moreover, it is also uncontradicted that Mosely spoke to Bobby Carruthers in February 1980. Carruthers made no effort to inform Mosely that Respondent was looking for him or that he had been sent a letter which was returned because of an improper address. Indeed, he told Mosely there were no jobs available. It is reasonable to impute to Bobby Carruthers knowledge of Sally Carruthers' efforts to recall striking employees not only because they are both officers of Respondent but also because they are married and because employees sometimes asked Bobby Carruthers about returning to work. In these circumstances, Respondent's efforts to recall Mosely were not sufficient to notify Mosely that he should return to work and to terminate his right to his former job. Mosely was thus not properly offered reinstatement.

James Moton: James Moton was working as a mixer-driver in Collierville at the time of the strike. On November 6, Moton talked to Bobby Carruthers at the Collierville office. Mose Harrison was also present during this conversation. Moton told Carruthers that he wanted to come back to work. Carruthers told him that he could not fire other employees and hire him back. Harrison said that when he had an opening he would get in touch with Moton. Moton made another attempt to return to work during the beginning of February. He called Joe Carruthers and asked him about coming back to work. Carruthers told him to get in touch with Mose Harrison. Moton did so, and told Harrison that he wanted to come back to work. Harrison said that he had no openings, but that he would contact Moton when he did. Harrison contacted Moton at the beginning of March and asked if Moton was ready to come to work. Moton came back to work the same day. Moton was not aware of any other attempts to contact him by Respondent.

Sally Carruthers testified that she first attempted to contact Moton on January 21, 1980, when she called his telephone number and received no answer. On January 24, she called and left a message for him. According to Mrs. Carruthers' testimony, Moton contacted her on January 24 and he was reinstated on February 23 to a Collierville mixer-driver's position. Mrs. Carruthers' notes indicate that Moton contacted her on February 1.

Moton should have been recalled before Respondent hired new employees for mixer-driver positions in December 1979. He was not properly recalled.

Percy Porter: At the time of the strike, Porter was a mixer-driver at the Collierville plant. After the strike ended, Porter called Mose Harrison and John Nichols and asked them if work was available. Nichols told him he had a truck available and asked him to come to the Winchester plant. Porter went to the Winchester plant the next morning but, when he arrived, he was met by Bobby Carruthers. Carruthers accompanied him to the gate where a sign was posted stating, "Employees Only." Carruthers pointed out the sign and told him to leave Respondent's premises and "wait on him out in the street." Porter's testimony in this respect was not controverted. Moreover, it is consistent with similar treatment by Carruthers of employee Wilborn. However, it is unclear in the record as to when the confrontation between Porter and Carruthers took place.

Mose Harrison testified that Porter called him shortly before Christmas 1979. After he became foreman—sometime in January 1980—Harrison met Porter at a bank. Harrison told Porter, "In a few days, it looks like when the weather breaks, I'm going to be needing you. I'm going to need some extra men and you're one." According to Harrison, Porter replied that he would rather be in a "soup line" than work for Respondent. Porter denied that he made such a statement to Harrison, although he did testify that he talked to Harrison before Christmas. Harrison reported this conversation to Sally Carruthers. He told her what Porter had told him and said, "Now you can call him. I don't know what he would tell you." Mrs. Carruthers testified that she was also told by an employee on an earlier occasion, on December 14, that Porter had told him that he did not want to return to work for Respondent. She made no other attempts to contact Porter until late May or early June 1980 when she offered Porter a position at Strayhorn. Porter informed her at that time that he had another job.

Porter should have been recalled in December 1979 before new mixer-drivers were hired. He was not recalled and is thus entitled to reinstatement and backpay. Evening assuming the truth of Harrison's statement that Porter told him he would rather be on a "soup line" than work for Respondent, that statement was made in January 1980, a month after new employees were hired. Nor can the statement be considered a definitive rejection by Respondent of a serious job offer. Harrison met Porter quite by accident. He was not specifically authorized by Mrs. Carruthers to make Porter a job offer. He was at best an intermediary used by Respondent to contact employees. Harrison's own testimony shows that he did not consider Porter's remarks to constitute a final rejection because he told Mrs. Carruthers to call Porter. She did not even call, however, and simply used Harrison's report as a means of crossing Porter off her list of employees. The hearsay report of another employee in December surely cannot constitute evidence of Porter's intent to abandon his job. Finally, as in Wilborn's case, Bobby Carruthers' expulsion of Porter from Respondent's premises after the strike demonstrates Respondent's animosity towards Porter. This animosity could only have been motivated by Porter's strike activity. In these circumstances, Porter was not properly offered reinstatement.[15]

James Price: Price was a mixer-driver at the Winchester plant. He did not tetify at the hearing. Sally Carruthers testified that she did not recall whether Price came to the Winchester plant on November 5, nor could she recall whether he made an individual offer to return. Mrs. Carruthers called Price on December 19 about a mixer-driver position filled on December 20, but was told that Price did not live there. She did not attempt to reach Price on January 13 because, at some time previously, she had been told that Price was seen driving a schoolbus. She also testified that she had asked some of the drivers to get in touch with him. Mrs. Carruthers testified that, sometime later, Larkin Harper found Price and told him that he should come back to work. Price returned on April 28, 1980.

There is no evidence that Price's address changed since before the strike. Thus, Respondent should have contacted him by mail and recalled him before hiring new mixer-drivers. Price was therefore not properly recalled.

Eugene Sanders: At the time of the strike Sanders was working as a mixer-driver at Winchester. After the strike ended, Sanders spoke with Hunter Carruthers at the Winchester plant. He asked Carruthers if he could go to work at that time and Carruthers said he could not because business was slow and because many new people had been hired. Sanders stated that Respondent did not contact him concerning reinstatement until late May. At that time, Sally Carruthers called and said that she had a job for him in Senatobia driving a gravel truck. Sanders called Mrs. Carruthers the next day and told her that he had no means of transportation to Senatobia, but that if she could find someone else going that way he would accept. Mrs. Carruthers replied that she would get back with Sanders after she checked with some other drivers.[16] A few days after his telephone conversation with Sally Carruthers, Sanders received a certified letter from Mrs. Carruthers. The letter, dated June 2, 1980, stated that, on May 29, he accepted a position with Respondent, but on May 30 "you called to inform me that you

[15] In its brief, Respondent has abandoned the argument it made at the hearing that Porter was not reinstated because of prestrike misconduct. The evidence shows that Respondent had some problem with Porter using and selling concrete. Although the evidence shows that other employees also did this with the knowledge of management, Bobby Carruthers caught Porter, told him not to do it again, and made him pay for the concrete. Porter was not fired or otherwise disciplined for this alleged misconduct and he continued to work until the strike.

[16] Sanders testified that his home was about a mile away from the Winchester plant, while it was approximately 43 miles from his home to Senatobia.

could not find transportation to the job and therefore could not accept this position."

Sally Carruthers testified that she called Sanders' home on December 19 about two available mixer-driver positions. At that time she was told by whoever answered the phone that Sanders was driving a gravel truck, and she left a message for him to call her. Mrs. Carruthers did not make any efforts to contact Sanders. Sanders testified that was the only job he has had since the strike began in April 1980 but that it was not a regular job. According to Sanders it was a "part time" job.

Respondent failed properly to recall Sanders before hiring new mixer-drivers.

Henry Tart: Henry Tart was a gravel truckdriver before the strike. At some point in early November, after having been on strike, Tart went to the Winchester plant and spoke to Hunter Carruthers. He offered to return to work. Carruthers responded that he did not have any work available and told Tart to come back the next day to get a layoff slip, which Tart did. Following the conversation with Hunter Carruthers, Tart spoke to John Nichols and Essie White several times about returning to work.

Tart testified that, at some point, he was told by another employee that Mose Harrison had said that Tart should return to work because his record was "all right." Tart reported to Collierville the next Monday and was employed as a gravel truckdriver. Two weeks later he was tranferred to a mixer-driver's position.

Tart testified that, shortly after the strike began, he moved from an address on Bickford Street to Auction Street and that he did not notify the Company of this move. He also testified that he did not have a telephone at the time of his conversation with Hunter Carruthers.

On December 12 or 13 Respondent hired a new employee, Roger Ford, as a gravel truckdriver. Mrs. Carruthers testified that, on December 11, she sent a letter to Tart since she had no record of his phone number. The letter stated that Respondent had a position open and would like for Tart to come back to work. The letter requested that Tart call Respondent if he was interested. The letter, which was mailed to the Bickford Street address, was returned undelivered. No further efforts were made to contact Tart. Mrs. Carruthers testified that, on February 11, Tart called and provided Respondent with his new address. He was reinstated on February 13.

Because Tart did not provide Respondent with a current telephone number or his current address, it was impossible for Respondent to reach him. Respondent did send him a letter in an attempt to recall him prior to hiring new employees. The letter was sent to his last known address. Respondent's efforts, in these circumstances, were adequate and Tart, who was eventually reinstated, is not entitled to any backpay.

James E. Walker: Walker was a mixer-driver stationed at the Winchester plant before the strike. Walker has lived at the same address and has had the same telephone number for the last 5-1/2 years. He gave Respondent this information when he began his employment in June 1979. After he had been on strike for some time, he spoke to Hunter Carruthers at the Winchester plant about returning to work. Hunter told him work was slack, that he did not need Walker, and that, if he did, he would call Walker. Walker testified that he did picket after this conversation so I believe it took place on November 5 and not on November 13 as Walker testified. Sometime in January 1980 after speaking to John Nichols regarding his reinstatement Walker called Joe Carruthers and told him that he would like to have his job back. Carruthers told him there was nothing he could do at that time, but he would let him know something in a few days.

Sometime after his conversation with Joe Carruthers, Walker went to the Winchester plant and spoke to John Nichols about returning to work. Nichols called Sally Carruthers, and Walker was rehired. Walker testified that he went back to work on February 13, 1980. Walker also testified that, to his knowledge, no one from Respondent had attempted to contact him after the strike.

Mrs. Carruthers' notes, which were received into evidence, indicate that she called Walker on December 19 and left a message for him to call her. On December 20, two new employees were hired for mixer-driver positions at Winchester. On January 18, two new employees were hired for mixer-driver positions at Winchester. On January 21, two more new employees were hired for Winchester mixer-driver positions and, on January 25, yet another new mixer-driver was hired for Winchester. Mrs. Carruthers testified that, on January 13, she called Walker, but received no answer. She called again on January 15 and left a message for Walker to return the call. On January 24, according to Mrs. Carruthers, Walker contacted her, and he was reinstated on February 4.

Walker was entitled to be reinstated prior to the hiring of new mixer-drivers and therefore was not properly recalled.

Oscar Wells: Oscar Wells was a gravel truckdriver before the strike. In early November 1979, he twice contacted Hunter Carruthers about returning to work. Hunter said that he had no jobs available, but that, if some became available, he would call Wells. Wells testified that he had given Respondent his address and phone number when he was first employed and also gave them to Hunter Carruthers when he talked to him in early November. Wells testified that he received a letter from Respondent sometime before March 1980. Wells testified that he did not read the letter but that his wife did. She told him the letter said something about coming to the office. Wells did not contact Respondent at that time because he had another job and he did not want to quit it to return to work for Respondent. Wells lives in Mississippi and he testified his job was closer to his home than Respondent's Memphis operations. He testified, however, that he had only received one letter from Respondent. Respondent did not submit any evidence of a letter sent to Wells and none is in the record. Mrs. Carruthers' notes indicate "reg letter 6/2/80" beside his name. When Respondent sent letters to other employees they were either introduced into the record or referred to in Mrs. Carruthers' notes. Thus, it is likely that Wells was mistakenly referring to the June 2, 1980, letter sent to all strikers who were not reinstated. Moreover, Wells' view

that he no longer wished to work for Respondent was not communicated to Respondent. Indeed, Respondent took the position at the hearing and in its brief that it had no intention of recalling Wells. Thus, although there is some ambiguity in Wells' testimony about when he received a letter from Respondent, I find and conclude that Respondent did not send Wells a letter, as it was required to do, before it hired new employees in his job classification. The only letter sent to Wells was sent on June 2, 1980, after Respondent hired new employees. Wells was thus not properly offered reinstatement.

Respondent contends that it was entitled to refrain from recalling Wells after the end of the strike because of his driving record while he worked for Respondent before the strike. I reject this contention. Wells credibly testified that only one of the traffic tickets he received while employed for Respondent involved the driving of a truck for Respondent and that no official from Respondent ever spoke to him about his driving record before the strike. An employer may not rely on alleged deficiencies of an employee which were tolerated before the employee engaged in a strike to deny him reinstatement after the strike. See *Marble Manufacturing Company of San Antonio*, 239 NLRB 1142, 1150 (1979).

Jimmy Wilborn: At the time of the strike Wilborn was working as a mixer-driver at the Winchester plant. He testified that, after the strike ended, he spoke to Elaine Crafton, the Winchester dispatcher, about returning to work. Crafton told him there was no work available and that the only thing he could do was to keep in touch with Respondent. She also said she would let him know if she needed anyone. Wilborn also talked to John Nichols during the weekend immediately after the election held on December 7, 1979. At that time, Nichols told him he would have to speak with Bobby Carruthers concerning his job and told him to come to the plant to talk to Carruthers. The following Monday, December 10, Wilborn went to the Winchester plant. As he was waiting in his car for Carruthers to arrive, Larkin Harper came out and told Wilborn that Carruthers did not want him there and that he had better leave. Harper said he was told by Bobby Carruthers to tell Wilborn to leave.[17]

About a week later, also in December, Wilborn returned to the Winchester plant and spoke to Bobby Carruthers. He told Carruthers that he did not feel that he was wrong for participating in the strike, but that he would like to have his job back. Carruthers replied that he had sent word to Wilborn through Harper to stay off the premises and that, if he came back again, Carruthers would call the police. Wilborn testified that this conversation occurred "in the shop." He did not return to Respondent's facility again because of Carruthers' threat although he did call Respondent several times thereafter seeking employment. Bobby Carruthers did not controvert this testimony.

Mrs. Carruthers testified that she attempted to call Wilborn on December 19 about a position which was filled by a new employee on December 20, but she received no answer. She again attempted to contact Wilborn by phone on January 13 regarding mixer positions filled by new employees in January. On this occasion, the woman who answered the phone stated that she was Wilborn's mother. Mrs. Carruthers said she then left the message for Wilborn to get in touch with her. She again called Wilborn on January 15, but received no answer. Wilborn testified that he did not receive any such message from his mother. Mrs. Carruthers testified that she did not attempt to contact Wilborn again concerning other mixer vacancies because "I had left a message with his mother and I had called other times and did not get an answer."

Respondent should have recalled Wilborn before hiring new gravel truckdrivers. The case in favor of Wilborn is especially strong because Bobby Carruthers had independent knowledge that Wilborn was at Respondent's facility seeking employment and he expelled Wilborn from the premises and threatened to call the police. I can only conclude that Carruthers' conduct was motivated by his animosity towards Wilborn for engaging in the strike. Mrs. Carruthers testified that she suspected Wilborn of scratching her car during the strike. Respondent attempted to prove this fact at the hearing. Mrs. Carruthers testified that she saw him run his hand alongside her car and that she later noticed that it was scratched. There was no evidence of the extent of the damage. Wilborn denied he scratched Mrs. Carruthers' car and his name was not mentioned during the November 13 strike settlement negotiations just 1 week after the incident allegedly occurred. Indeed, Mrs. Carruthers testified that she attempted to call Wilborn for work in December 1979 and in January 1980. She admitted that her suspicion that Wilborn had scratched her car had nothing to do with failing to reinstate him. She also surmised that Bobby Carruthers "wanted him off the lot" because she reported her suspicion of the Wilborn scratching incident to her husband. In these circumstances, Bobby Carruthers' treatment of Wilborn was out of proportion to his alleged strike misconduct. Although not alleged as a separate violation of the Act, it reinforces the finding I make that Respondent discriminated against Wilborn by failing to recall him because he engaged in strike activity.

Eddie Williams: Williams was working as a mixer-driver at the Winchester plant at the time of the strike. He testified that, approximately 1 month after the end of the strike, he spoke with Hunter Carruthers and John Nichols at the Winchester plant concerning reinstatement. He asked Carruthers when he was going to get his job back. Carruthers replied that he only had one truck running and that there was no work. Nichols stated that Respondent did not need any employees.

Williams also testified that his next contact with Respondent was when Sally Carruthers called his residence and left a message for him to call her. Williams returned the call and Mrs. Carruthers stated that she had an opening for two dump truckdrivers at Respondent's gravel pit in Mississippi. Williams replied that he had no transportation to Mississippi and that, if she had anything else, he

[17] Harper admitted that he was told by Bobby Carruthers to tell Wilborn to leave and that the police would be called if he did not do so. Harper testified that Wilborn was the only nonworking employee inside the gate at this time, and that there was a company rule that off-duty employees must leave the premises.

would be willing to accept it. He asked whether Respondent could provide transportation to the jobsite. Mrs. Carruthers replied that Respondent could not provide transportation and that Williams had to find his own. Following this conversation, Williams received a letter from Respondent, dated June 2, 1980, which stated that Respondent had offered him a position for which he was qualified, but "You stated that transportation to the job was a problem and that you could not accept this position." Williams testified that he was unaware of any other attempts by Respondent to contact him and that he has had no other communication with Respondent.

Mrs. Carruthers testified that she called Williams on December 19 about positions filled by new employees on December 20 and left a message. She also called Williams on January 13 and 15, but received no answer on both occasions. Mrs. Carruthers testified that she did not call Williams concerning other mixer-driver positions available in February because "I had left a message with him and called him on other occasions and received no answers." Mrs. Carruthers' notes indicate the notation, "Driving gravel truck for company called Consolidated." However, Mrs. Carruthers did not testify as to how she received this information. Williams testified that he had driven a gravel truck for two or three different employers since the strike ended but said that none of those jobs constituted regular employment.

Respondent did not properly recall Eddie Williams prior to hiring new mixer-drivers.

W. G. Williams: At the time of the strike, W. G. Williams was working as a mixer-driver at the Winchester plant. In early December, Williams called Respondent's office and spoke to Hunter Carruthers. Williams reminded Carruthers that, on an earlier occasion when he had asked for employment, Hunter told him to call him about job openings. He again asked if there were job openings. Carruthers replied that there were still no openings and asked Williams to keep checking with him.

Williams testified that he asked to return to work once again in February. At that time he spoke to Bobby Carruthers at the Winchester plant. He told Carruthers that he wanted to see about getting his job back and that he needed the work. Carruthers replied that he was short of work, but that he had been planning on calling some of the employees back in the spring. He said that he had been considering Williams. Williams reemphasized that he needed the work, but Carruthers replied that he could not use him at the time because work was slow. Williams was not cross-examined about this conversation and Bobby Carruthers did not testify about such a conversation or deny that it took place. In a pretrial affidavit Williams mentioned refusing a job offer from Nichols and another person but mentioned nothing about a conversation with Mrs. Carruthers.

Mrs. Carruthers testified that she attempted to call Williams on December 19 about positions filled by new employees on December 20. At that time she was told that his number had been disconnected. She then sent Williams a letter on December 19. The December 19 letter to Williams stated, "We have a position open and would like for you to come back to work. Please call me at 853-7335 if you are interested." Williams testified that he did not "remember" receiving such a letter. Mrs. Carruthers stated that she did not attempt to call Williams in January "because his number had been disconnected and I had sent him a letter and had not gotten any response from that." Mrs. Carruthers also testified that she was told on January 15 by some drivers that they had seen Williams driving another company's truck at a gravel pit. Mrs. Carruthers testified that she did not attempt to contact Williams in February because "his number had been disconnected and I did not have another number, and also I had sent him a letter." Mrs. Carruthers also stated that she had sent John Nichols "to look for these people to get them back to work," and that she was told by Nichols that Williams told him in late March that he did not want to return to work because he was already working at another ready-mix company.

Williams testified that, in April 1980, he was contacted at his home by John Nichols. Nichols asked Williams if he wanted to return to work. Williams said he was working at another job but that he was still interested in returning to work for Respondent. He had started working for another firm on April 3. Nichols told Williams that he should call Mrs. Carruthers. According to Williams, he called Mrs. Carruthers about a week later and she told him that, while she was planning to recall some of the strikers, there were no openings at that time. In a pretrial affidavit, Williams had stated that "Carruthers offered me my job back April 6 or 7, but I turned it down because I have a better job." On cross-examination, Williams explained that what he meant in his affidavit was his conversation with John Nichols. He reiterated that he called Mrs. Carruthers after talking with Nichols and that she said she had no openings. Although the affidavit contained a reference to Nichols offering him his job back, it apparently contained nothing about Williams wanting his job, Nichols telling Williams to call Mrs. Carruthers, or Williams actually calling Mrs. Carruthers. Nichols did not testify and Mrs. Carruthers did not confirm or deny that Williams called her in April. But she did testify that she asked Nichols to try to get in touch with Williams and that she was told by Nichols in late March that Williams did not want to return to work because he was working at another ready-mix company.

I do not find Williams' testimony on this point to be reliable. In addition to the apparent conflict between his testimony and his affidavit, it is unlikely that he would call Mrs. Carruthers after having told Nichols that he had another job. Williams testified that he considered Nichols his "foreman." In these circumstances, Williams knew or had reason to believe that Nichols had the authority to transmit an offer to return to work. Thus, I believe that Williams turned Nichols down because he had a better job as he stated in his affidavit. Whether this happened in March or April is unclear on this record. But the Nichols conversation took place after the alleged February conversation with Bobby Carruthers. Because of Williams' unreliability generally, I cannot credit his testimony about this conversation. In addition, Williams testified that he could not "remember" receiving the December 1979 letter from Respondent. If Mrs. Carruthers' hearsay reports about Williams driving a truck in Janu-

ary 1980 were correct, they might explain why there was no response to Respondent's letter to Williams in December 1979. Although the issue is a close one, I find, based on my assessment of Williams' lack of credibility as a witness, that Respondent's December 1979 letter was received by Williams and that he did not respond to it because he did not want to return to work for Respondent. In addition, Respondent made other reasonable alternative efforts to contact Williams, notably the contact by John Nichols. Williams failed to respond because, in my view, he did not wish to return to work. Williams is therefore not entitled to reinstatement and backpay.

CONCLUSIONS OF LAW

1. By discharging and terminating the employment of employees Milton Brown and William Frazier for engaging in protected concerted and union activity, Respondent violated Section 8(a)(3) and (1) of the Act.

2. By failing to properly recall and reinstate striking employees who had ceased their strike and offered unconditionally to return to work, Respondent has discriminated against those employees in violation of Section 8(a)(3) and (1) of the Act.

3. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Except as found herein, Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that employees Brown and Frazier were unlawfully discharged or terminated, I shall order that Respondent offer Brown and Frazier full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any and all losses of earnings caused by Respondent's unlawful discharges. Having found that employees Earl Banks, Grafton Burton, Columbus Jones, Bobby Jones, Edward Moore, James Moton, James Price, and James Walker—employees who were eventually reinstated—were not properly recalled under the applicable principles of *Fleetwood* and *Laidlaw* before Respondent hired new employees in their job classifications, I shall order that Respondent make them whole for any loss of earnings they may have suffered because of Respondent's unlawful failure properly to recall them. Having found that employees Mario Burks, Nathaniel Jones, Robert E. Jones, McQuirin Malone, Steve McClain, B. J. Mosely, Percy Porter, Eugene Sanders, Oscar Wells, Jimmy Wilborn, and Eddie Wiliams were not properly recalled or reinstated after the end of the strike, I shall order that Respondent immediately reinstate those employees to positions for which they are qualified and which were filled by new hires on and after December 13, 1979, in accordance with applicable principles set forth in *Fleetwood* and *Laidlaw*.[18] To the extent that there are not positions presently available for all these employees entitled to reinstatement because sufficient vacancies did not occur after December 13, 1979, such employees shall be placed on a preferential hiring list and should be offered jobs for which they are qualified as vacancies occur and before new persons are hired for such work, unless they obtained regular and substantially equivalent employment before jobs to which they were entitled became available.[19] Priority for placement on such list shall be based on a nondiscriminatory standard. All the employees who are entitled to reinstatement shall be made whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them. All backpay in this case shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).[20]

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, Carruthers Ready Mix, Inc., Collierville and Memphis, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, terminating, or otherwise discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment because they engage in a strike or any other concerted protected or union activity.

(b) Refusing to accord strikers who were not permanently replaced as of November 13, 1979, reinstatement rights to which they are entitled as economic strikers.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[18] As I have indicated earlier in this Decision, all 19 employees mentioned above should have been recalled before any new employees were hired. I express no view as to the order in which they would have been recalled had they been properly recalled. It is conceivable that 1 or another of the 11 employees who have reinstatement rights might have obtained regular and substantially equivalent employment prior to the filling of the vacancy to which he was entitled. It is also conceivable that an employee who was actually recalled would not have been recalled until later than he actually was under a proper recall procedure. If so he may not actually be entitled to any backpay. Because I am unable to determine the order in which any of the employees would have been recalled, I have treated them all as having been entitled to recall as of the hiring of the first new employee on December 13, 1979. Any problems with respect to the order of recall and the consequences which flow therefrom may be resolved in the compliance stage of this proceeding.

[19] Respondent contends that, as of the date of this hearing, there were apparently eight vacancies for which new employees were hired. There were thus positions for at least 8 of the 11 strikers who were entitled to reinstatement.

[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to employees Milton Brown and William Frazier full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them in the manner set forth in "The Remedy" section of this Decision.

(b) Reinstate the employees named below to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges:

Mario Burks	B. J. Mosely
Nathaniel Jones	Percy Porter
Robert E. Jones	Eugene Sanders
McQuirin Malone	Oscar Wells
Steve McClain	Jimmy Wilborn
Eddie Williams	

(c) Make the above employees and the following employees whole for any loss of earnings they may have suffered because of the failure of Respondent to properly reinstate them on and after December 13, 1979, in the manner set forth in The Remedy section of this Decision:

Earl Banks	Edward Moore
Grafton Burton	James Moton
Columbus Jones	James Price
Bobby Jones	James Walker

(d) Place on a preferential hiring list, based on nondiscriminatory standards, for employment, as positions become available and before other persons are hired for such work, any employees listed in paragraph (b) who would not have been reinstated because sufficient vacancies have not occurred after December 13, 1979, to accommodate all such employees entitled to reinstatement, unless they have obtained regular and substantially equivalent positions prior to the time when jobs to which they were entitled became available.

(e) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all records and reports necessary to determine the amount of backpay due under the terms of this Order.

(f) Post at its places of business in and around Memphis, Tennessee, copies of the attached notice marked "Appendix."[22] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."